CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 734

MARY FLAGLER CARY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries

1

DOCKET NO. 96066

MRS. MARY FLAGLER CARY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

2

Appearances:

For Petitioner: Joseph C. White, Esq., Richard H. Wilmer, Esq.

For Respondent: John R. Wheeler, Esq.

DOCKET ENTRIES:

1938

Nov. 5—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 5—Copy of petition served on General Counsel. 3

1939

Jan. 3—Answer filed by General Counsel.

Jan. 3—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 12—Notice issued placing proceeding on New York City Calendar. Copy of answer and request served.

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

4 *Docket Entries*

Nov. 14—Hearing had before Mr. Murdock on the merits. Submitted. Consolidated with 96235-6-7. Stipulation of facts filed. Briefs due in 60 days—reply briefs in 15 days.

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as counsel filed.

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Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 18—Brief filed by taxpayer.

Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served.

May 31—Memorandum opinion rendered—Mr. Murdock,

6 Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe for record filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MRS. MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with residence at 1009 Park Avenue, New York, New York. The return for the period here involved was filed with the Collector for the Third District of New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938.

3. The taxes in controversy are income taxes for the calendar year 1936 and in the amount of Eleven thousand eighty-four dollars ($11,084).

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(1) Substitution of the basis of $68,610.24 in lieu of a basis of $122,943.62 in the computation of a profit

10 *Petition*

on the sale of 1,919 shares of the preferred stock of Standard Oil Export Corporation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January
11 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

> "I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved
> 12 wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

"The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

"During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:

"1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that herein-

after by subsequent clause of this item provided for, as shall not be required during the extended or second period of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

"in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock."

(f) The petitioner herein is one of the children referred to in the foregoing quotation from Item Seventh of said last will and testament and was born prior to May 20, 1913.

(g) Item Ninth of said last will and testament provided as follows:

"All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and

transfer to my said wife at the expiraion of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

* * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes

shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Third of the codicil of said Henry M. Flagler dated January 8, 1906, provided in part as follows:

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

"In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(j) Item First of the codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

"Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making,

publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.

"Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for."

(k) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

(l) Said trustees delivered, assigned and transferred to the petitioner subsequent to May 20, 1923, but as of that date, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited. In 1925 the petitioner received a stock dividend of 2,666 ordinary shares of the stock of Anglo-American Oil Company, Limited in respect of said 8,000 shares of said stock, giving her an aggregate of 10,666 shares of said stock. On January 31, 1930 said 10,666 shares were exchanged for 1,919.88 shares of the preferred stock of Standard Oil Export Corporation. In 1930 the petitioner sold the 88/100 share and in her income tax return for that year ascribed a tax basis thereto of $56.38.

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(m) The fair market value of said 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited on May 20, 1923, was $123,000. The fair market value of said 1,919.88 shares of the preferred stock of Standard Oil Export Corporation on January 31, 1930 was $186,228.36.

(n) The tax basis of said 1,919 shares of preferred stock of Standard Oil Export Corporation on May 28, 1936, was not less than $122,943.62.

29

(o) On or about May 28, 1936 the petitioner sold said 1,919 shares of the preferred stock of Standard Oil Export Corporation for which she received the net amount of $215,462.21.

WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable year herein involved, and grant such other and further relief as the Board shall deem proper.

JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for Petitioner.

30

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

MARY FLAGLER CARY being duly sworn deposes and says:

That she is the petitioner above named; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein; and that the statements contained therein are true except those

Exhibit A 31

stated to be on information and belief and that those she believes to be true.

MARY FLAGLER CARY.

Subscribed and sworn to before me
this 4th day of Nov., 1938.

GEO. R. McGEE
Notary Public, Nassau County
Nassau County Clerk's No. 2220
New York Co. Clerk's No. 312 Reg. No. O-Mc-185
Commission Expires March 30, 1940 32

(Seal)

EXHIBIT A

1467M SN-IT-1

Aug. 25, 1938

IT:A:1
JMF:90D

33

Mrs. Mary Flagler Cary,
1009 Park Avenue,
New York, New York.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936 discloses a deficiency of $11,150.47 as shown in the statement attached.

34 *Exhibit A*

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the at-
35 tention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

36 By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner.

JMF/RS-2

Enclosures:
Statement
Form of waiver

87

STATEMENT

IT:A:1
JMF:90D

Mrs. Mary Flagler Cary,
1009 Park Avenue,
New York, New York.

Tax Liability for Taxable Year Ended
December 31, 1936

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	Liability	Assessed	Deficiency
Income tax	$144,048.75	$132,898.28	$11,150.47

In making this determination of your income tax liability careful consideration has been given to the report of examination dated May 26, 1938, and to the facts and data on file in this office.

A copy of this letter and enclosures has been mailed to your representative Mr. Joseph C. White, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

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Adjustments to Net Income

Net income as disclosed by return	$256,868.06
Unallowable deductions and additional income:	
(a) Dividends	97.75
(b) Capital gain	16,300.01
Net income adjusted	$273,265.82

40 *Statement*

Explanation of Adjustments

(a) Dividend on four shares Allied Mills valued at $97.75 received on Corn Products Refining Company stock omitted from the return has been added to total dividends reported.

(b) The facts show that you received 8,000 shares Anglo-American Oil stock plus a stock dividend of 33⅓ percent making a total of 10,666⅔ shares with a cost basis to the decedent of $6.4375 per share. This stock was exchanged in
41 1930 on the basis of 5⅝ shares for one share of Standard Oil Export Preferred stock resulting in 1,919.88 shares on a basis of $35.7638 per share, or a total of $68,666.62. Since 0.88 shares with a cost of $56.38 were sold in 1930 there remains a corrected basis of $68,610.24 for the remaining 1,919 shares sold in the taxable year 1936. Inasmuch as the correct basis of 1,919 shares of Standard Oil Export Preferred stock is $68,610.24 instead of $122,943.62, the fair market value at date of distribution as reported, there is an increase in capital gain of $54,333.38. Since the original stock was held more than ten years the increase in taxable gain is 30 percent of this amount or $16,300.01. Section 113(a)(5) of
42 the Revenue Act of 1936 provides as follows:

> "Property Transmitted at Death—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The term acquisition is defined in article 113(a)(5), Regulations 94, as "* * * the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property * * *."

Statement 43

Computation of Tax

Net income adjusted	$273,265.82
Less:	
Personal exemption	2,500.00
Surtax net income	$270,765.82
Less:	
Earned income credit (10% of $3,000.00)	300.00
Balance subject to normal tax	$270,465.82
Normal tax at 4% on $270,465.82	$ 10,818.63
Surtax on $270,765.82	133,290.12
Total tax	$144,108.75
Less:	
Income tax paid at source	60.00
Income tax liability	$144,048.75
Tax previously assessed, account #207386	132,898.28
Deficiency	$ 11,150.47

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45

JMF/RS-2

46

Answer

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96,066.

MRS. MARY FLAGLER CARY,

Petitioner,

v.

47 COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed in this proceeding, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

48 3. Admits that the taxes in controversy are income taxes for the calendar year 1936, but denies the remaining allegations of paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. Admits the allegations contained in subparagraphs (l) and (o) but denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (m), and (n) of paragraph 5 of the petition.

Denies each and every allegation in said petition not hereinbefore admitted or denied.

WHEREFORE, it is prayed that the appeal be denied.

J. P. WENCHEL, WFG
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON, Division Counsel.
JOHN R. WHEELER,
Special Attorney,
Bureau of Internal Revenue.

JRW/drc 12/29/38.

Stipulation of Facts

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

It is hereby stipulated and agreed by and between the Petitioner and the Respondent by their respective attorneys

52 *Stipulation of Facts*

of record that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Petitioner is an individual with residence at 1009 Park Avenue, New York, New York. The return for the period here involved was filed with the Collector of Internal Revenue for the Third District of New York.

53 2. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, and seven codicils dated, respectively, February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in the Court of County Judge in and for St. Johns County, Florida, on May 24, 1913. A copy of said last will and testament and codicils thereto, together with the probate proceedings thereon, marked Exhibit A, is attached hereto and made a part hereof.

54 3. Pursuant to Items Third and Fifth of said last will and testament a trust was created covering substantially the whole of the estate of the Testator, including stock of Anglo-American Oil Company, Limited, hereinafter referred to.

4. By Item Fifth of said last will and testament, said trust was to continue for a term of five years from the time of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties should be in such condition as "to require financial aid from someone outside of themselves * * *."

55

5. Pursuant to the provisions of Item Fifth of said last will and testament, said trust did continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923.

6. On May 20, 1923, the date of the expiration of said trust, three children of Harry Harkness Flagler, son of the Testator, were living. The Petitioner was one of said three children.

7. Pursuant to the decree of the Circuit Court, Eastern District of Missouri, in the case of *U. S.* v. *Standard Oil Co. N. J. et al.,* 173 Fed. 177 (1909), and affirmed with modifications by the Supreme Court of the United States, in the case of *The Standard Oil Company of New Jersey* v. *The United States,* 221 U. S. 1, providing for the disintegration of the Standard Oil Co. of New Jersey, there was issued to and received by the stockholders of said Standard Oil Co. of New Jersey one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Co. of New Jersey.

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8. Subsequent to May 20, 1923, but as of that date, said trustees transferred, pursuant to the provisions of said last will and testament and codicils, to the Petitioner, among other things, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, which had theretofore been held by said trustees in trust as aforesaid.

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9. Said 8,000 shares of the stock of Anglo-American Oil Company, Limited, so transferred to the Petitioner had been acquired by said trustees as follows:

(a) Two thousand six hundred sixty-six and two-thirds of said shares were received, with others, by said trustees as of the date of death of the Testator, namely May 20, 1913.

58 *Stipulation of Facts*

(b) On November 26, 1913, after the estate of the Testator was in the hands of said trustees, a 100% stock dividend was declared by the Anglo-American Oil Company, Limited. Said trustees accordingly received, on December 3, 1913, 2,666⅔ additional ordinary shares of said stock.

(c) In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional shares of the ordinary stock of said company. Two thousand six hundred sixty-six and two-thirds shares were subscribed for by said trustees at $7.50 per share. These 2,666⅔
59 shares were received by said trustees on May 1, 1918.

10. In 1925 the Petitioner received a stock dividend of 2,666 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of the 8,000 shares of said stock which had been transferred to her by said trustees as aforesaid, giving her an aggregate of 10,666 shares of said stock.

11. On January 31, 1930, said 10,666 ordinary shares of the stock of Anglo-American Oil Company, Limited, were exchanged in a tax-free reorganization for 1,919.88 shares
60 of the preferred stock of Standard Oil Export Corporation (5⅓ shares of Anglo-American Oil Company, Limited, stock for one share of preferred stock of Standard Oil Export Corporation).

12. In 1930 the Petitioner sold the 88/100 share of preferred stock of Standard Oil Export Corporation and in her income tax return for that year ascribed a tax basis thereto of $56.38.

13. On or about May 28, 1936, the Petitioner sold the remaining 1,919 shares of the said preferred stock of Stand-

ard Oil Export Corporation for which she received the net amount of $215,462.21.

14. In reporting such sale of said 1,919 shares of said preferred stock and computing the profit therefrom in her income tax return for the year 1936, the Petitioner ascribed a basis of $122,943.62 to said 1,919 shares of said preferred stock of Standard Oil Export Corporation.

15. The market value on May 20, 1923, of the ordinary shares of Anglo-American Oil Company, Limited, was $15.25 per share.

16. The market value on May 20, 1913 of the ordinary shares of Anglo-American Oil Company, Limited, was $18.25 per share.

17. In the notice of deficiency (a copy of which, marked Exhibit A, is attached to the petition) the Respondent ascribed to said 1,919 shares of said preferred stock of Standard Oil Export Corporation a basis of $68,610.24 in lieu of the basis of $122,943.62 ascribed by the Petitioner as aforesaid.

Dated New York, N. Y., November 13, 1939.

JOSEPH C. WHITE
Attorney for Petitioner

J. P. WENCHEL
ECA
Attorney for Respondent

64

EXHIBIT A

CERTIFIED COPY OF

LAST WILL AND TESTAMENT

WITH CODICILS THERETO

65

of

HENRY M. FLAGLER
Deceased

AND PROBATE PROCEEDINGS THEREON BEFORE THE
HON. M. R. COOPER, COUNTY JUDGE OF
ST. JOHNS COUNTY, FLORIDA

66

INCLUDING PETITION FOR PROBATE OF WILL AND CODICILS,
WITH PROOFS, AFFIDAVIT OF EXECUTORS, ORDER
ADMITTING TO PROBATE, OATH OF EXECUTORS,
LETTERS TESTAMENTARY, ETC.

Exhibit A

LAST WILL AND TESTAMENT
WITH CODICILS THERETO
of
HENRY M. FLAGLER, Deceased

I, Henry M. Flagler, of Palm Beach, county of Dade and state of Florida, do make, declare and publish this my last will and testament, hereby revoking all former wills and testaments by me made.

FIRST: I direct all my just debts, funeral expenses and the expenses of administering and carrying out the provisions of this instrument to be fully paid.

SECOND: I hereby appoint William H. Beardsley of the city, county and state of New York, and William R. Kenan, Jr., at this date residing in the city of Lockport, State of New York, and Joseph R. Parrott, of the city of Jacksonville in the state of Florida, to be executors of and Trustees under this my last will and testament.

THIRD: I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the "Fourth" Item of this instrument, and may be necessary for the expense of administration

by my executors, including court costs, to my Trustees above named, which trusts shall be and continue for the length of time hereinafter by this instrument provided.

FOURTH: I have agreed by letter addressed to John F. Forbes, to contribute to the John B. Stetson University, the sum of Sixty Thousand Dollars ($60,000) to be paid from time to time as the needs of said University shall seem to require, and if any portion of said Sixty Thousand Dollars ($60,000) shall remain unpaid at the time of my death, I hereby direct my said executors to pay said balance out of any moneys or property coming into their hands as such.

I have also agreed to contribute to the Florida Agricultural College, which college is located at Lake City, Florida, the sum of Twenty Thousand Dollars ($20,000), for the erection and equipping of a gymnasium, and if any portion thereof shall remain unpaid at the time of my death, I hereby direct my executors to pay the same to the proper authority of said college out of any moneys or property coming into their hands as such.

FIFTH: The balance of my estate I place, according to the purpose declared in the "Third" Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida

railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby.

SIXTH: During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:

1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that hereinafter by subsequent clause of this item provided for, as shall not be required during the extended or second period of said trust, provided for in the "Fifth" Item of this instrument shall be paid to my said wife annually.

2. To the Trustees of the Memorial Presbyterian Church Society of St. Augustine, Florida, the annual sum of Three Thousand Dollars ($3,000), payable in quarterly installments from the date of my decease; but it is to be distinctly understood that this annuity to said Trustees shall cease upon the payment of the bequest to said Trustees hereinafter made by a subsequent item of this instrument.

3. The lawful expenses of such trust.

SEVENTH: At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or

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instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son. And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said
77 trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock. I have heretofore in my life given to my said son securities which have during the last five years yielded him an annual income of more than seventy-five thousand ($75,000). My son has not shown for me the filial regard that would make me inclined to do more for him now than is done by this item of my will.

EIGHTH: At the expiration of said trust the Trustees
78 shall pay to each of the following named persons and institutions the cash amounts hereinafter provided to be paid; but no such persons or institution shall take hereunder unless such person or institution shall be living or in existence at the expiration of said trust. Should, however, any such person not be living at the time his or her amount is payable as above and hereinafter provided, then I direct that such sum shall be paid to his or her child or children, if there be any such child or children then living, such children, if there be more than one, to take share and share alike, and where there is a wife surviving she is to take as a child; but if such donee be dead and there be no child or children nor any

wife in case the donee is a male person, then the legacy shall not take effect or be operative.

1. To Miss Annie C. McKay, of the city of St. Augustine, Florida, and to Mrs. Ella Green, now at Palm Beach, Florida, and to Stephen A. Bravo, John P. Beckwith, William H. Chambers, E. J. Triay and George W. Wilson, each the sum of Five Thousand Dollars ($5,000).

2. To Bernard O'Brien, my coachman, George Holland, my butler, and Ida Scheiffer, my housekeeper, the sum of Five Thousand Dollars ($5,000) each in recognition of their long and faithful service in such capacities. 80

3. To James A. McGuire, R. T. Goff, Fred Sterry, John Anderson, Joseph D. Price, Henry W. Merrill, Joseph A. McDonald, William H. Beardsley, and Jasper C. Salter, each the sum of Ten Thousand Dollars ($10,000).

4. To James E. Ingraham, the sum of Twenty Thousand Dollars ($20,000).

5. To Joseph R. Parrott, the sum of One Hundred Thousand Dollars ($100,000).

6. To Charles D. Boice and Lawrence C. Haynes each the sum of Twenty-five Hundred Dollars ($2,500). 81

7. To the Florida Agricultural College above named, the sum of Eighty Thousand Dollars ($80,000).

8. To the John B. Stetson University above named, the sum of Forty Thousand Dollars ($40,000).

9. To the trustees of Hamilton College in the state of New York, One Hundred Thousand Dollars ($100,000).

10. To the trustees of the Memorial Presbyterian Church Society of St. Augustine, Florida, above mentioned Seventy-five Thousand Dollars ($75,000). Should my Trustees find that all of or any of the bequests herein above by this item

of this instrument provided for, can be paid before the expiration of said trust without interfering with the purposes of such trust then they may pay the said bequests or such of them as they may decide can be paid without such interference and shall elect to pay, preferring that made to the Trustees of the Memorial Presbyterian Church Society above the others.

NINTH: All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust
83 and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New
84 York, and my property, Number Twenty-one West Fifty-fifth Street in the city of New York, state and county of New York.

TENTH: For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end

that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

The names or titles, executors or Trustees wherever used in this instrument shall be deemed to include and denote any and all persons who shall be, under the provisions hereof, be appointed substitutes or successors whether immediately or otherwise of such Trustees or be otherwise appointed successors or substitutes for such executors as executors; and I hereby authorize, empower and direct said Trustees, their substitutes or successors to pay from my estate all the necessary expenses of administering and carrying into effect such trust, and my executors to pay all the necessary expenses of administering as executors; and such Trustees shall receive from my said trust estate, each the sum of five thousand dollars ($5,000) annually to be paid in cash annually as compensation for each year as such Trustee.

It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

The Florida East Coast Railway Company; and the Florida East Coast Hotel Company.

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I direct that my executors and Trustees nominated or appointed in or under the provisions of this instrument shall in either capacity not be required to give bond or surety or indemnity for or in connection with the discharge of powers or duties hereunder.

If by reason of failure to qualify or otherwise any or all of the Trustees specifically nominated in this instrument shall not serve or shall cease to serve after having qualified as such I hereby direct that such vacancy or vacancies be filled by appointment by such of them as may qualify or be serving at the time that any such vacancy may occur,
89 and should they be unable to agree then such vacancy shall be filled by the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, my place of residence may be at the time, from two persons, of whom one shall be nominated by each of such Trustees then surviving; and should there be two vacancies existing at any one time, then such vacancies shall be filled by the remaining Trustee and my said wife, and if such surviving Trustee and my wife cannot agree, then such vacancies shall be filled by appointment to be made by such Circuit Judge as follows:

One from two persons to be nominated by such surviving Trustee and the other from two persons to be nominated
90 by my wife; and should there be a vacancy at any time as to all of such Trustees, then the same shall be filled by appointment by my wife subject to the approval of the said Circuit Judge. If at the time of the filling of any such vacancy there should be duties to be performed under this instrument by executors as distinguished from Trustees then the person or persons appointed to such vacancy or vacancies as Trustees shall act as executor or executors under this instrument.

ELEVENTH: I do further direct, ordain and declare and it is my will that if any person named in this instrument

as a beneficiary or legatee or devisee or any one interested thereunder shall at any time or in any manner institute or cause to be instituted or shall aid, abet, connive at or directly or indirectly promote, the institution of any contest of, or proceeding or litigation contesting or intended to contest, defeat or obstruct this instrument or any provision thereof or the enforcement of any such provision, then any and every such offending person or persons whether natural or artificial shall, whether such contest, proceeding or litigation be successful or not thereby forfeit all interest under this instrument, and the provision made in and by such instrument for any such offending person shall be of no effect 92 and this instrument shall be executed and carried into effect as if such person were not named therein and no provision had been made therein as to or for such person.

TWELFTH: I desire and direct that Mr. Joseph R. Parrott above named shall be continued during the continuance of such trust in the same official and business relations that he now occupies as to and in the management of and administration and operation of my said railroad and hotel companies and land companies and the properties of the same and each of them, and that he shall receive compensation for his services therein not less than he may be receiving at my death, such compensation to be in addition to and dis- 93 tinct from the above provided annual compensation of five thousand dollars as Trustee under this instrument; and it is to be distinctly understood that nothing in his duties as such Trustee is to interfere with his continuing such existing relation as to such companies and properties or either or any of the same, nor with his voting any stock held by him and his co-Trustees as such Trustees, in any such company or voting as director or otherwise acting to the end that his being continued in such existing relation to such companies or properties or any of the same. I further desire and will and direct that nothing in the duties of such Trustees hereunder shall

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prevent them or any of them from acting as a director or other official of any company aforesaid or of any company in which I may be a stockholder or interested. Whatever transfer of stock to any one of such Trustees may be necessary to enable him to be a director in any such company I direct shall be made by such Trustees and I authorize such Trustees to depute and authorize any one of their number to vote and otherwise act for all such Trustees at any meeting or stockholders.

THIRTEENTH: It is my will and meaning that the annual
95 compensation of Five Thousand Dollars ($5,000) above provided for each Trustee shall also cover any services rendered by any Trustee, or person acting as such, as an executor.

In witness whereof I have hereto set my hand and seal at Palm Beach in the county of Dade and state of Florida, this first day of February, A. D. one thousand nine hundred and two.

(Signed) HENRY M. FLAGLER (Seal).

The foregoing instrument comprising ten pages of typewritten matter, written upon one side of the sheet only was on this the first day of February, A. D. one thousand nine
96 hundred and two, signed, sealed, published and declared by the testator, Henry M. Flagler, as and for his last will and testament in the presence of us and of each of us at Palm Beach in the county of Dade and state of Florida, and we in the presence and at the request of said testator and in the presence of each other have hereunto subscribed our names as witnesses to said last will and testament and have severally written opposite our respective names our individual addresses, this the day and year last aforesaid.

(Signed) GEO. P. RANEY, Tallahassee, Fla.
" B. F. WILLIS, Tallahassee, Fla.
" LELAND STERRY, Palm Beach, Fla.

Exhibit A

I, Henry M. Flagler, of Palm Beach, Dade county, state of Florida, being of sound and disposing mind and memory, do make, publish and declare this as and to be a codicil to my last will and testament executed by me at Palm Beach, Dade county, Florida, February 1st, A. D. 1902.

Item First: Nothing in my said last will and testament is to be understood or be construed as having the effect to deny to the trustees, mentioned in the Fifth Item thereof, the power and authority to complete any particular extension of the railroad of the Florida East Coast Railway Company south of Miami that may have been commenced at the time of my death, but on the contrary they shall have the power and authority to complete any such extension that may have been commenced at the time of my death.

Item Second: Nothing in the Twelfth Item or elsewhere in my said last will and testament is to be understood or be construed as meaning that Mr. J. R. Parrott, mentioned in said will and testament, shall not succeed me in the Presidency of the Florida East Coast Railway Company, but on the contrary it is my purpose and desire that he shall at my death, become the President of such Company, and I hereby direct that upon my death he shall be elected to such Presidency, and further direct that he shall, during the continuance of the trust provided as to said railroad and the properties of the same by my last will and testament, be continued in such Presidency: the occupation of such office by him, being in my judgment necessary to carry out my purposes as to his management, administration and operation of my railroad properties as expressed in the Twelfth Item of my said last will and testament.

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal at Palm Beach, Dade county, Florida, this February 17th, A. D. 1903.

(Signed) HENRY M. FLAGLER (Seal).

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The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of Palm Beach, Dade County, Florida, in our presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we, at his request, and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses, at Palm Beach, aforesaid, this the day and year last above written.

(Signed) LELAND STERRY.
101 " GEORGE E. HOPKINS.
" A. R. WOOD.

I, Henry M. Flagler, of Palm Beach, Dade county, state of Florida, being of sound and disposing memory, do make, publish and declare this as and to be a second and additional codicil to my last will and testament executed by me at Palm Beach, Dade county, state of Florida, February 1st, 1902.

FIRST: Wherever the expression "expiration of said trust," or an expression of similar import is used in my said last will and testament, the same shall be understood to in-
102 clude the extended period of said trust as well as the original period of five years. Such has always been my intention and understanding of the terms used, but this explanation is adopted for the purpose of preventing any misunderstanding of my will or purposes.

SECOND: I wish further to say, in explanation of the provision made in Item numbered "Seventh" of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time of my death or at the time of the expiration of the trust therein referred to, such expression "expiration of said trust" to be understood

as explained in the Item numbered "First" of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate.

THIRD: I hereby revoke the Item of my said last will and testament numbered "Eighth" in so far as it makes provision for the payment of eighty thousand dollars to the Florida Agricultural College, now known as the Florida University, and located at Lake City, Florida, and in so far as it makes provision for the payment of forty thousand dollars to the John B. Stetson University, located at DeLand, Florida, and annul the gifts made therein to such institutions severally; and I hereby direct that at the expiration of the trust provided for by my said last will and testament and referred to in Item number "First" of this codicil, the trustees shall pay to each of the following persons the cash amounts hereinafter provided to be paid, to wit: to Joseph P. Greaves, Robert Murray and Leland Sterry each the sum of ten thousand dollars; and this provision for said three gentlemen is to be read and construed as part of the Item numbered "Eighth" of said last will and testament and subject to the provisions thereof the same as if written into said Item numbered "Eighth" as a part of the third subdivision thereof; and in so far as William H. Beardsley is concerned, I hereby change and increase the provision made for him by the third paragraph of Item numbered "Eighth" of my last will and testament to the sum of Fifty Thousand Dollars, it being my will and direction that he shall be paid this sum instead of ten thousand dollars.

FOURTH: The words "any meeting or stockholders" at the conclusion of Item numbered "Twelfth" of my said last will and testament are to be read and construed as meaning "any meeting of stockholders."

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FIFTH: For the purpose of declaring my will as to the disposition of the rest, residue and remainder of my estate mentioned in and covered by Item numbered "Ninth" of my said last will and testament, I hereby amend the said Item numbered "Ninth" of my last will and testament, by adding at the end of such item the following words: to wit: but in case I should survive my wife, Mary Lilly Flagler, leaving no children surviving me except my son Harry Harkness Flagler, I hereby give, devise and bequeath all of such property and estate to the following persons, to be divided between them share and share alike, forever, and I hereby authorize,
107 empower and direct my said executors and trustees, to pay over and transfer said property to them at the expiration of said trust all of such estate and property, viz: Rob H. York, Roy H. York, W. L. Harkness and Mrs. John D. Maclennan, all of Cleveland, Ohio, William R. Kenan, Jr., Jesse K. Wise and Sarah G. Kenan, all of Wilmington, North Carolina, Joseph R. Parrott, of Jacksonville, Florida, and William H. Beardsley of New York City. Should any one or more of such nine persons not be living at my death, then the share which any such deceased person would take if he or she were living at the time of my death shall go to his or her heirs forever, and be payable to such heir or heirs at the
108 expiration of such trust.

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal, at St. Augustine, Florida, this April 28th, A. D. 1904.

(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of Palm Beach, Dade County, Florida, in our presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at

his request and in his presence and in the presence of each other, have hereto set our hands as subscribing witnesses, at St. Augustine, aforesaid, this the day and year last above written.

(Signed) ANDREW ANDERSON of St. Augustine, Florida.
" GEO. P. RANEY of Tallahassee, Fla.
" B. F. WILLIS of Tallahassee, Fla.

I, Henry M. Flagler, lately of Palm Beach, Dade County, State of Florida, but now of St. Augustine, St. Johns County, 110
State of Florida, being of sound and disposing mind and memory, do make, publish and declare this as and to be a third and additional codicil to my last will and testament executed by me at Palm Beach, Florida, February 1st, 1902:

Item First: I find, upon further consideration of the matter, that the statement in Item "Seventh" of my above mentioned last will and testament to the effect that I had prior to the execution of such last will and testament given to my son, Harry, securities which had yielded to him during the last five years preceding the date of such last will and testament an annual income of more than Seventy-five Thousand Dollars is not entirely correct as to the amount; 111
nevertheless, I do not consider that there is, under all the circumstances, any good reason for increasing the provision made in favor of my said son by my said last will and testament, and I make the above declaration simply because of the above mentioned inaccuracy of statement in my said last will and testament. The securities referred to are Standard Oil Stock.

Item Second: I hereby revoke the provision of the "Eighth" Item of my said last will and testament, constituting the second sentence in such item and reading as fol-

lows: "Should, however, any such person not be living at the time his or her amount is payable as above and hereinafter provided, then I direct that such sum shall be paid to his or her child or children, if there be any such child or children then living, such children, if there be more than one, to take share and share alike, and where there is a wife surviving she is to take as a child: but if such donee be dead and there be no child or children, nor any wife in case the donee is a male person, then the legacy shall not take effect or be operative."

113 Such revocation is to apply as well to any child or children or wife of the person named hereinafter as a beneficiary, or any person named as a beneficiary in the "Third" Item of the second codicil to my will, which codicil was executed at St. Augustine, Florida, April 28th, 1904, as it does to any child or children or wife of any beneficiary named in said "Eighth" Item of my said last will and testament.

I hereby direct that at the expiration of the trust provided for by my said last will and testament, the trustees shall pay to Henry E. Bemis the sum of Ten Thousand Dollars. This provision for said Henry E. Bemis to be read and construed as a part of the Item numbered "Eighth" of my said last will and testament and subject to the provisions
114 thereof as amended by the above revoking provision of this, "Second" Item of this codicil, the same as if written into said Item numbered "Eighth" as a part of the third subdivision thereof.

Item Third: I wish to, and do hereby amend the "Tenth" Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such

sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes. 115

I also wish to and do hereby amend the "Tenth" Item of my said last will and testament by revoking, and do hereby revoke the power as to the appointment of trustees therein given to the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, may be and do hereby confer upon the Circuit Judge of the Judicial Circuit in which St. Augustine, Florida, my present place of residence, may be, the same powers intended to be conferred by said Item upon the Circuit Judge of the Judicial Circuit in which Palm Beach, Florida, might be, as provided in said Item of my said last will and testament. 116

In testimony whereof I, the said Henry M. Flagler, have hereunto set my hand and seal at St. Augustine, Florida, this the 8th day of January, 1906.

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(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, in our presence, and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing wit-

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nesses at St. Augustine, aforesaid, this the day and year last above written.

(Signed) JOHN T. DISMUKES of St. Augustine.
" REGINALD WHITE of St. Augustine.
" W. W. DEWHURST of St. Augustine.

I, Henry M. Flagler, of St. Augustine, St. Johns County, State of Florida, do make publish and declare this instrument as and to be a fourth and additional codicil to my last will and testament executed by me at Palm Beach, Florida,
119 February 1st, 1902.

Item First: It is my desire and will that none of the bequests made in and by the "Eighth" Item of my said will and testament shall, except those in favor of William H. Beardsley, James E. Ingraham and Joseph R. Parrott, be operative in favor of any beneficiary named in such paragraph unless such beneficiary shall at the time of my death be in the employ of myself individually or of the Florida East Coast Railway Company or of the Florida East Coast Hotel Company; and my desire and will is the same as to the several beneficiaries named in the "Third" Item of the
120 second codicil to my said will and testament, executed at St. Augustine, Florida, on the twenty-eighth (28th) day of April, A. D. 1904; and I direct that no payment shall be made to any beneficiary named in said "Eighth" and "Third" Items, excepting however said William H. Beardsley, James E. Ingraham and Joseph R. Parrott, unless he or she shall at the time of my death be in my employ or in that of the Florida East Coast Railway Company, or in that of the Florida East Coast Hotel Company. The terms "Eighth Item" and "Third Item" as used above are to be severally understood as including such Items as changed by me in any codicil to my said will, and as including any person or persons named in any such codicil as a beneficiary; and the fact

that any such beneficiary may not now be in my employ or in the employ of either of said companies shall not exempt him or her from the above requirement of being at the time of my death in my employ or in that of one of said companies to entitle him or her to the bequest in favor of him or her. 121

Item Second: I hereby exempt all and singular the executors and Trustees named in my last will and testament, or that may be appointed under the provisions thereof, including codicils, from making settlements with returns, including inventories to the County Judge or other Court. Such executors and Trustees shall not, nor shall either or any of them be required to give bond or security as such. 122

In testimony whereof I have hereunto set hereunto set (sic) my hand and seal at St. Augustine, Florida, this seventh day of April, A. D. 1908.

(Signed) HENRY M. FLAGLER (Seal).

The above written instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, in our presence, and by him, in our presence, published, acknowledged and declared to be a codicil to his last will and testament as therein stated, and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses at St. Augustine, Florida, this the day and year last above written. 123

(Signed) M. W. HARRISON,
967 Greene Ave., Brooklyn, N. Y.
" ANDREW ANDERSON, St. Augustine, Fla.
" GEO. P. RANEY, of Tallahassee, Fla.

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I, Henry M. Flagler, of St. Augustine, Fla., do make, publish and declare this instrument as and to be a fifth and additional codicil to my last will and testament executed by me at Palm Beach, Florida, February 1st, 1902.

Item 1st: My said executors and Trustees are hereby authorized and directed to continue the payment of dividends to Horace H. Flagler, of St. Augustine, Fla., for and during the term of his natural life, on the fifty shares of Standard Oil Company (of New Jersey) stock (Certificate No. 25,085 or any reissues thereof) and on any accumula-
125 tions thereon that may result from stock dividends and upon any stock or other securities that may result from the sale or exchange of said stock in case of any change or reorganization that may take place hereafter.

Item 2nd: The provisions made in my last will and testament in favor of the Memorial Presbyterian Church Society of St. Augustine, Florida, are made upon the assumption and expectation that such Church or Society will maintain and continue its connection with the Presbyterian Church in the United States of America. Should I in my lifetime deliver to the Trustees of such Memorial Presbyterian Church Society cash or securities or other property in lieu
126 or satisfaction of such provisions of my last will and testament, then all such provisions of my last will and testament shall thereupon cease to be of any effect.

In testimony whereof I said Henry M. Flagler, have hereto set my hand and seal at St. Augustine, Florida, this the 22nd day of December, A. D. 1910.

(Signed) HENRY M. FLAGLER (Seal).

The above instrument was signed and sealed by Henry M. Flagler, the testator therein named, of St. Augustine, St. Johns County, Florida, at St. Augustine aforesaid in our

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presence and by him in our presence published, acknowledged and declared to be a codicil to his last will and testament as therein stated and we at his request and in his presence and in the presence of each other have hereto set our hands as subscribing witnesses at St. Augustine aforesaid this the day and year last above written.

(Signed) GEO. P. RANEY.
" WARREN E. SMITH.
" WADDY O'HEAR THOMPSON.

I, Henry M. Flagler, of the City of St. Augustine, State 128
of Florida, do make this codicil to my last will heretofore made and published by me dated the day of A. D. , which will I hereby ratify and confirm in all respects save as changed by this instrument.

Whereas in and by my said last will I have bequeathed to the Memorial Presbyterian Church Society, a corporation incorporated by chapter 4249, laws of Florida securities of the par value of Seventy-five Thousand Dollars, and since publishing my said last will said Memorial Presbyterian Church Society by deed dated May 29th, A. D. 1911, recorded in the public records of St. Johns County, Florida, in Deed Book 22, pages 61-63, has made a declaration of the trusts 129
under which it holds the lot of land adjoining said Memorial Church on which I have built the mausoleum, one of which trusts is to perpetually care for and maintain said mausoleum, the expense of such maintenance to be met by a fund by me provided. Now, therefore, to provide such fund I do direct that the income from said bequest made in and by my last will to said Memorial Presbyterian Church Society be received, held and expended by said corporation.

First: For the perpetual care and maintenance of the mausoleum built by me, and the church building and manse,

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situated on the lot at the corner of Sevilla and Valencia Streets, in the City of St. Augustine, Florida, which I gave to the trustees of the Presbyterian Church of St. Augustine; then the balance of such income to be used for the general parish expenses of said Memorial Presbyterian Church Society, including its charities.

In testimony whereof I have hereunto set my hand this tenth day of January, A. D. 1912, at St. Augustine, Florida.

(Signed) HENRY M. FLAGLER.

131

The foregoing instrument was signed, published and declared at the date thereof by the said Henry M. Flagler as a codicil to his last will in the presence of us, who at the same time at his request and in his presence, and in the presence of each other, hereunto subscribe our names as attesting witnesses.

(Signed) WARREN E. SMITH.
" WADDY O. THOMPSON

I, Henry M. Flagler, resident of the city of St. Augustine,
132 in the State of Florida, having heretofore made, published and declared my last will and testament, do hereby make, publish and declare the following as and for a codicil thereto.

First: Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form

of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.

Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament, the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said 134
stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for.

Second. It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate.

Third: I hereby revoke the provision in my last will and testament made for the benefit of Horace H. Flagler, of St. Augustine, Florida, and I hereby will and direct that my Trustees and executers (sic) named in my last will and testament pay to the said Horace H. Flagler, during the term of 135
his natural life, the sum of Two Thousand Dollars per annum, same to be paid in quarterly installments, of Five Hundred Dollars each, on the first days of January, April, July and September of each year.

Fourth: And I hereby ratify and confirm my said last will and testament in every respect, except in so far as any part of the same is inconsistent with this codicil.

In witness whereof, I have hereunto set my hand and seal, and published and declared this to be a codicil to my

136 *Exhibit A*

said last will and testament in the presence of the witnesses named below, this thirteenth day of September, in the year of our Lord, one thousand nine hundred and twelve.

(Signed) HENRY M. FLAGLER (Seal).

Signed and declared by the said Henry M. Flagler as and for a codicil to his said last will and testament in our presence.

(Signed) R. H. WARREN.

137 " WM. L. WARREN.

" JAMES WEEKS.

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing will, with codicils thereto, in the public records of said county.

138 M. R. COOPER,
County Judge.

Exhibit A 139

PROBATE PROCEEDINGS

PETITION OF JOHN T. DISMUKES

IN THE COUNTY JUDGE'S COURT, SITTING IN PROBATE, STATE OF FLORIDA, ST. JOHNS COUNTY.

In re Estate of

HENRY M. FLAGLER, 140
Deceased.

ST. JOHNS COUNTY.

To the Honorable M. R. Cooper, County Judge in and for the County of St. Johns, State of Florida, Sitting in Probate.

Your petitioner, John T. Dismukes, would respectfully show unto this Honorable Court:

First: That he, the said John T. Dismukes, is a resident of St. Johns County, Florida, and above the age of twenty-one 141 years.

Second: That Henry M. Flagler died on Tuesday, the twentieth day of May, A. D. 1913, and at the time of his death was a citizen of said state and a resident of said county, being above the age of twenty-one years, to-wit: eighty-three years of age, and at the time of his death was seized and possessed of certain real and personal estate, situate and being in said county and state.

Third: That the said Henry M. Flagler died leaving a last will and testament dated the first day of February, A. D. 1902, wherein and whereby the following named persons were

142 *Exhibit A*

named as executors thereof, to-wit: Joseph R. Parrott, William H. Beardsley, and William R. Kenan, Jr., and the said Henry M. Flagler executed said will in the presence of George P. Raney, B. F. Willis, and Leland Sterry, as subscribing and attesting witnesses thereto.

Fourth: And your petitioner further alleges that the said Henry M. Flagler subsequently executed divers codicils to said will and testament, which said codicils were made and executed and attested and witnessed at the times and dates as hereinafter set forth.

143 (a) Codicil dated February 17th, A. D. 1903, executed in the presence of Leland Sterry, George E. Hopkins and A. R. Wood, as subscribing and attesting witnesses thereto.

(b) Codicil dated April 28th, A. D. 1904, executed in the presence of Andrew Anderson, George P. Raney, and B. F. Willis, as subscribing and attesting witnesses thereto.

(c) Codicil dated January 8th, A. D. 1906, executed in the presence of John T. Dismukes, Reginald White, and W. W. Dewhurst, as subscribing and attesting witnesses thereto.

(d) Codicil dated April 7th, A. D. 1908, executed in the presence of Andrew Anderson, George P. Raney, and M. W.
144 Harrison, as subscribing and attesting witnesses thereto.

(e) Codicil dated December 22nd, A. D. 1910, executed in the presence of George P. Raney, Warren E. Smith and Waddy O'Hear Thompson, as subscribing and attesting witnesses thereto.

(f) Codicil dated January 10th, A. D. 1912, executed in the presence of Warren E. Smith and Waddy O. Thompson, as subscribing and attesting witnesses thereto.

(g) Codicil dated September 13th, 1912, executed in the presence of R. H. Warren, William L. Warren and James Weeks, as subscribing and attesting witnesses thereto.

Exhibit A

Fifth: And your petitioner further alleges that he verily believes that the paper writings herewith propounded for probate and record as and for the last will and testament of the said Henry M. Flagler, deceased, and all the codicils heretofore subscribed and set forth with the several dates hereinbefore described and set forth and attested and signed by said witnesses as hereinbefore described and set forth, is the true last will and testament and codicils to said last will and testament of the said Henry M. Flagler, deceased. 145

Sixth: Your petitioner further says that he has no interest whatever under the said last will and testament or under any of the codicils thereto. 146

Therefore your petitioner prays that the said paper writings herewith propounded for probate and record be admitted to probate and record as and for the last will and testament and the codicils thereto of the said Henry M. Flagler deceased, and that Letters Testamentary be granted to the said executors hereinbefore named and set forth in said last will and testament pursuant to law, the said Henry M. Flagler having died in the State of Florida on the day and year first before set forth.

147

And your petitioner will ever pray, etc.

(Signed) JOHN T. DISMUKES,
Petitioner.

148 *Exhibit A*

State of Florida,
County of St. Johns. }

Personally appeared before me John T. Dismukes, to me well known, who, being by me duly sworn, says that the foregoing petition by him subscribed, is true.

Signed and sworn to before me this 24th day of May, 1913.

(Signed) M. R. Cooper,
County Judge.

(Court Seal.)

149 State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

150 In re the Estate of
Henry M. Flagler,
Deceased.

State of Florida,
County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Leland Sterry of New York City, State of New York, who, being by me duly sworn, says that he was personally present as a subscribing and attesting witness with George P. Raney and B. F. Willis who were also present as such subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the

Exhibit A 151

instrument of writing hereto annexed as and for his last will and testament, and that the said Henry M. Flagler did, then and there, in the presence of said Leland Sterry, George P. Raney and B. F. Willis publish and declare the same to be his last will and testament. That the said Leland Sterry, witness, did then and there, at the special request of said Henry M. Flagler and in his presence subscribe his name thereto; that the said Leland Sterry then and there heard the said Henry M. Flagler specially request the said George P. Raney and B. F. Willis to sign the same and that the said George P. Raney and B. F. Willis and this deponent signed 152
their names thereto in the presence of said Henry M. Flagler and in the presence of each other, and at the special request of said Henry M. Flagler, and did subscribe their names as attesting witnesses; and that the said Leland Sterry further swears that he verily believes the said instrument of writing dated February 1st, 1902, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true last will and testament of said testator the said Henry M. Flagler.

(Signed) LELAND STERRY.

Subscribed and sworn to before me this 24th day of May, A. D. 1913.

153
(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

*Together with No. 735, Flagler v. Comm. and No. 736, Estate of Flagler v. Comm. and No. 737, Matthews v. Comm.

154 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

155 State of Florida, County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Leland Sterry, of New York City, N. Y., who being by me duly sworn says that he was personally present as a subscribing and attesting witness with George E. Hopkins and A. R. Wood, who were also present as the subscribing and attesting witnesses, and saw the testator Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 17th day of February, A. D. 1903, did then
156 and there in the presence of said Leland Sterry, George E. Hopkins and A. R. Wood, publish and declare the same a codicil to his last will and testament; that the said Leland Sterry did then and there at the special request of said Henry M. Flagler and in his presence subscribe his name thereto; that the said Leland Sterry then and there heard the said Henry M. Flagler specially request the said George E. Hopkins and A. R. Wood to sign the same, and that the said George E. Hopkins and A. R. Wood and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said Le-

Exhibit A 157

land Sterry further swears that he verily believes the said instrument of writing dated the 17th day of February, A. D. 1903 and hereto attached and so subscribed published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) LELAND STERRY.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

158

(Signed) M. R. COOPER,
County Judge.

(Court Seal)

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

159

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

160 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

161 State of Florida, County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said County, personally appeared John T. Dismukes and W. W. Dewhurst of St. Augustine, Florida, who being by me duly sworn say that they were personally present as subscribing and attesting witnesses with Reginald White of St. Augustine, who was also present as a subscribing and attesting witness and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 8th day of January, A. D. 1906, did
162 then and there in the presence of said John T. Dismukes, W. W. Dewhurst and Reginald White, publish and declare the same a codicil to his last will and testament; that the said John T. Dismukes and W. W. Dewhurst, did then and there at the special request of said Henry M. Flagler, and in his presence subscribe their names thereto; that the said John T. Dismukes and W. W. Dewhurst, then and there heard the said Henry M. Flagler specially request the said Reginald White to sign the same, and that the said Reginald White and these deponents signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flag-

Exhibit A 163

ler, and did subscribe their names thereto as attesting witnesses; and that the said John T. Dismukes and W. W. Dewhurst further swear that they verily believe the said instrument of writing dated the 8th day of January, A. D. 1906, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) JOHN T. DISMUKES.
W. W. DEWHURST.

164

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county. 165

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

166 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
167 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Warren E. Smith and Waddy O'Hear Thompson who being by me duly sworn say that they were personally present as subscribing and attesting witnesses with George P. Raney, who was also present as a subscribing and attesting witness, and saw the testator Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 22nd day of December, A. D. 1910, did then and there in the presence of said Warren E. Smith, Waddy O'Hear Thompson
168 and George P. Raney, publish and declare the same a codicil to his last will and testament; that the said Warren E. Smith and Waddy O'Hear Thompson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe their names thereto; that the said Warren E. Smith and Waddy O'Hear Thompson then and there heard the said Henry M. Flagler specially request the said George P. Raney to sign the same and that the said George P. Raney and these deponents signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses;

and that the said Warren E. Smith and Waddy O'Hear Thompson further swear that they verily believe the said instrument of writing dated the 22nd day of December, A. D. 1910, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) WARREN E. SMITH,
WADDY O'HEAR THOMPSON.

Subscribed and sworn to before me, this 24th day of May, 170
A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records 171
of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

172 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
173 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for sai county, personally appeared Warren E. Smith and Wadd O. Thompson, who being by me duly sworn say that the were personally present as subscribing and attesting wi nesses, and saw the testator Henry M. Flagler, subscribe hi name to the instrument of writing hereto attached as an for a codicil to his last will and testament; and that th said Henry M. Flagler, on the 10th day of January, A. D 1912, did then and there in the presence of said Warren E Smith and Waddy O. Thompson, publish and declare th same a codicil to his last will and testament; that the sai
174 Warren E. Smith and Waddy O. Thompson, did then an there at the special request of said Henry M. Flagler and i his presence subscribe their names thereto; that the sai Warren E. Smith and Waddy O. Thompson, then and ther heard the said Henry M. Flagler specially request that sai Warren E. Smith and Waddy O. Thompson, to sign th same and that these deponents signed their names theret in the presence of said Henry M. Flagler and in the pre ence of each other and at the special request of said Henr M. Flagler, and did subscribe their names thereto as attes ing witnesses; and that the said deponents further swea that they verily believe the said instrument of writing date

the 10th day of January, A. D. 1912, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) WARREN E. SMITH.
WADDY O. THOMPSON.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER, 176
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER, 177
County Judge.

Endorsed: Filed May 24th, 1913.

178 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
179 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared James Weeks, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with R. H. Warren and Wm. L. Warren, who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing hereto attached as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 13th day of September, A. D. 1912, did then and there in the presence of said James Weeks, R. H. Warren and Wm. L.
180 Warren, publish and declare the same a codicil to his last will and testament; that the said James Weeks, did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said James Weeks, then and there heard the said Henry M. Flagler specially request the said R. H. Warren and Wm. L. Warren to sign the same and that the said R. H. Warren and Wm. L. Warren and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said James Weeks fur-

ther swears that he verily believes the said instrument of writing dated the 13th day of September, A. D. 1912, and hereto attached and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) JAMES WEEKS.

Subscribed and sworn to before me, this 24th day of May, A. D. 1913.

182

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

183

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

184 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida, }
County of St. Johns. } ss.:

185 Before me, M. R. Cooper, County Judge, in and for said county, personally appeared William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott, who being duly sworn on oath say that they are the identical persons named and described in the last will and testament of Henry M. Flagler, dated February 1st, A. D. 1902, and appointed in said last will and testament as the executors of said last will and testament; that the said William H. Beardsley resides in the city of New York, state of New York, that the said William R. Kenan, Jr., resides in the city of Lockport, state of New York, and the said Joseph R. Parrott resides in the city of Jacksonville, state of Florida; that they are willing to accept
186 and undertake the trust confided in them and to each of them in said last will and testament and the codicils thereto, and pray that Letters Testamentary issue to them as provided by law.

(Signed) WILLIAM H. BEARDSLEY.
WILLIAM R. KENAN, JR.
JOSEPH R. PARROTT.

Subscribed and sworn to before me this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

Exhibit A 187

State of Florida, }
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

188

ORDER ADMITTING TO PROBATE AND RECORD IN COURT OF COUNTY JUDGE IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In the Matter of the Last Will and Testament of

Henry M. Flagler, Deceased.

By the County Judge of said county:

The said last will and testament, with codicils thereto, having been duly established by sworn testimony of John T. Dismukes, petitioner, and of Leland Sterry, John T. Dismukes, W. W. Dewhurst, Warren E. Smith, Waddy O'Hear Thompson, Waddy O. Thompson, and James Weeks, subscribing and attesting witnesses thereto, as being the true last will and testament, and codicils thereto, of the said Henry M. Flagler, no objection being made to the probate thereof, and it appearing to the County Judge of said county by due proof that the said Henry M. Flagler died on the twentieth day of May, A. D. 1913: 189

It is therefore ordered, adjudged, and decreed that the said last will and testament, bearing date February 1st,

190 *Exhibit A*

A. D. 1902, attested by Leland Sterry, Geo. P. Raney, and B. F. Willis as subscribing witnesses thereto, and the codicil dated February 17th, A. D. 1903, attested by Leland Sterry, Geo. E. Hopkins, and A. R. Wood as subscribing witnesses thereto, the codicil dated April 28th, A. D. 1904, attested by Andrew Anderson, Geo. P. Raney and B. F. Willis, as subscribing witnesses thereto, the codicil dated January 8th, A. D. 1906, and attested by John T. Dismukes, Reginald White, W. W. Dewhurst as subscribing witnesses thereto, the codicil dated April 7th, A. D. 1908, and attested by Andrew Anderson, Geo. P. Raney, and M. W. Harrison as subscribing witnesses thereto, the codicil dated December 22nd, A. D. 1910, and attested by Geo. P. Raney, Warren E. Smith, Waddy O'Hear Thompson as subscribing witnesses thereto, the codicil dated January 10th, A. D. 1912, and attested by Warren E. Smith, Waddy O. Thompson, as subscribing witnesses thereto, and the codicil dated September 13th, A. D. 1912, attested by R. H. Warren, Wm. L. Warren and James Weeks as subscribing witnesses thereto, be, and the same are, hereby admitted to probate according to law as and for the true last will and testament and codicils thereto of the said Henry M. Flagler, deceased, and that the same, with the proof thereof, be duly recorded in the book of wills.

191

192 Given under my hand and seal at St. Augustine, in St. Johns County, Florida, this 24th day of May, A. D. 1913.

(Signed) M. R. Cooper,
County Judge.

State of Florida,
County of St. Johns.

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the last will and testament and codicils thereto set forth in the order admitting to probate, together with the proof thereof and said order.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

Exhibit A 193

IN COURT OF THE COUNTY JUDGE, STATE OF FLORIDA, IN PROBATE.

In re the Estate of

HENRY M. FLAGLER,

Deceased.

ST. JOHNS COUNTY.

194

Before me, M. R. Cooper, County Judge of said county, personally appeared William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott, who being by me first duly sworn, say that Henry M. Flagler, late of the county of St. Johns and State of Florida, died on the 20th day of May, A. D. 1913, leaving his last will and testament, and that they the said deponents are named therein as executors thereof. That they will faithfully discharge the duties of executors aforesaid; well and truly perform the said last will and testament; pay the just debts in which the said Henry M. Flagler stood bound, so far as the assets will extend and the law direct; render to and file in the County Judge's Court 195 of said county of St. Johns a just, true and perfect inventory and account of all and singular the estate of said Henry M. Flagler, deceased, and of their administration thereof when thereunto required.

(Signed) William H. Beardsley.
" William R. Kenan, Jr.
" Joseph R. Parrott.

Sworn to and subscribed before me this 24th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal)

196 *Exhibit A*

State of Florida,
County of St. Johns.

Be it remembered, that on this 24th day of May, 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 24th, 1913.

197

LETTERS TESTAMENTARY

STATE OF FLORIDA, COUNTY JUDGE'S COURT,
ST. JOHNS COUNTY, IN PROBATE.

To All to Whom These Presents Shall Come, Greeting:

Whereas, Henry M. Flagler, late of the county aforesaid, died on the 20th day of May, A. D. 1913, leaving his last will
198 and testament, with codicils thereto, which, having been satisfactorily proven, was, on the 24th day of May, A. D. 1913, duly admitted to probate and record in this Court. And as by said last will and testament appears that William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott were appointed executors having prayed the Court to grant Letters Testamentary thereon to them the said executors as such executors and having, in due form of law, taken the prescribed oath, and performed all other acts necessary to their legal qualification as such executors:

Now therefore, know ye, that I, M. R. Cooper, County Judge in and for the county aforesaid, by virtue of the power

and authority by law in me vested, do hereby declare the said William H. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott duly qualified by the laws of said State to act as executors of said last will and testament, and codicils thereto, with full power, by the provisions of law and by virtue of these presents, to administer all and singular the goods, chattels, rights and credits of said Henry M. Flagler, and to ask, demand, sue for, recover, and receive the same; to pay the debts in which the said Henry M. Flagler stood bound, so far as the assets shall extend and the law direct; and duly entitled to have and to hold for the purposes directed in and by the said last will and testament and codicils 200 thereto, all the estate of said Henry M. Flagler during the legal continuance of their administration, until the same shall expire by virtue of the provisions of said last will and testament and codicils thereto, or until the power and authority hereby granted shall be duly revoked according to law.

In testimony whereof, I hereunto set my hand and affix the seal of the County Court of the county aforesaid, at St. Augustine, Florida, this 24th day of May, A. D. 1913.

(Signed) M. R. Cooper,
County Judge.

(Seal of Court) 201

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 24th day of May, A. D. 1913, I duly recorded the foregoing Letters Testamentary in the public records of said county.

(Signed) M. R. Cooper,
County Judge.

Endorsed: Filed May 24th, 1913.

202 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of
HENRY M. FLAGLER,
Deceased.

State of Florida,
203 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Andrew Anderson of St. Augustine, Florida, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with Geo. P. Raney and M. W. Harrison who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing attached to the will as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 7th day of April, A. D. 1908, did then and there in the presence of said Andrew Anderson, Geo. P.
204 Raney and M. W. Harrison, publish and declare the same a codicil to his last will and testament; that the said Andrew Anderson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said Andrew Anderson then and there heard the said Henry M. Flagler specially request the said Geo. P. Raney and M. W. Harrison to sign the same and that the said Geo. P. Raney and M. W. Harrison and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that

the said Andrew Anderson further swears that he verily believes the said instrument of writing dated the 7th day of April, A. D. 1908, and attached to said will and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) ANDREW ANDERSON.

Subscribed and sworn to before me this 29th day of May, A. D. 1913.

206

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.:

Be it remembered that on this 29th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

207

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 29th, 1913.

208 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

In re the Estate of

HENRY M. FLAGLER,

Deceased.

State of Florida,
209 County of St. Johns. } ss.:

Before me, M. R. Cooper, County Judge in and for said county, personally appeared Andrew Anderson of St. Augustine, Florida, who being by me duly sworn says that he was personally present as a subscribing and attesting witness with Geo. P. Raney and B. F. Willis, who were also present as the subscribing and attesting witnesses, and saw the testator, Henry M. Flagler, subscribe his name to the instrument of writing attached to the will as and for a codicil to his last will and testament; and that the said Henry M. Flagler on the 28th day of April, A. D. 1904, did then and there in the presence of said Andrew Anderson, Geo. P.
210 Raney and B. F. Willis, publish and declare the same a codicil to his last will and testament; that the said Andrew Anderson did then and there at the special request of said Henry M. Flagler, and in his presence subscribe his name thereto; that the said Andrew Anderson then and there heard the said Henry M. Flagler specially request the said Geo. P. Raney and B. F. Willis to sign the same and that the said Geo. P. Raney and B. F. Willis and this deponent signed their names thereto in the presence of said Henry M. Flagler and in the presence of each other and at the special request of said Henry M. Flagler, and did subscribe their names thereto as attesting witnesses; and that the said Andrew

Exhibit A

Anderson further swears that he verily believes the said instrument of writing dated the 28th day of April, A. D. 1904, and attached to the will and so subscribed, published and declared and attested as aforesaid to be the true codicil to the last will and testament of said testator, the said Henry M. Flagler.

(Signed) ANDREW ANDERSON.

Subscribed and sworn to before me this 29th day of May, A. D. 1913.

(Signed) M. R. COOPER,
County Judge.

(Court Seal.)

State of Florida,
County of St. Johns. } ss.

Be it remembered that on this 29th day of May, A. D. 1913, I duly recorded the foregoing oath in the public records of said county.

(Signed) M. R. COOPER,
County Judge.

Endorsed: Filed May 29th, 1913.

214 *Exhibit A*

IN COURT OF COUNTY JUDGE, IN AND FOR ST. JOHNS COUNTY, FLORIDA, IN PROBATE

I, M. R. Cooper, County Judge, in and for said county, do hereby certify, that I am sole presiding Judge of the Court of the County Judge in and for St. Johns county, state of Florida; that said Court, under the Constitution and Laws of the state of Florida, has and exercises Probate Jurisdiction in said St. Johns county; that as such presiding Judge, I am ex-officio clerk of said Court, there being no qualified
215 clerk thereof; that as such sole presiding Judge and ex-officio clerk, I have, by law, the custody of the Seal, and all books, records, documents, papers and files appertaining to said Court; that the foregoing, from page one to page 35 hereof, inclusive, are full, true and correct copies of the last will and testament, with codicils thereto, of Henry M. Flagler, deceased, together with all probate proceedings thereon, to the date of this certificate, including Letters Testamentary issued upon the estate of Henry M. Flagler, deceased; and that all the originals of same are on file and of record in my said office, and recorded in book B of Wills on pages 202 to 241, inclusive; and that Wm. M. Beardsley, William R. Kenan, Jr., and Joseph R. Parrott the executors in said will are duly
216 qualified and still acting as such executors.

In testimony thereof, I have hereunto set my hand and affixed the seal of said Court, at St. Augustine, Florida, this 6th day of June, A. D. 1913.

(Signed) M. R. Cooper,
County Judge.

Exhibit A

State of Florida,
St. Johns County.

I, M. R. Cooper, County Judge of the county of St. Johns and State of Florida, and ex-officio Judge of the Probate Court of said county, do hereby certify that M. R. Cooper, whose signature appears to the foregoing exemplification and attestation made by him, is in due form of law and by the proper officer, and that at the date hereof he is County Judge of St. Johns county, Florida, and the seal thereto attached is the seal of said County Judge's Court.

In witness whereof I have hereunto affixed my name and the seal of my office at St. Augustine, in said county, this 6th day of June, A. D. 1913.

(Court Seal).

(Signed) M. R. Cooper,
County Judge and Ex-Officio
Judge of the Probate Court of
St. Johns County, Florida.

STATE OF FLORIDA

OFFICE OF THE SECRETARY OF STATE

I, H. Clay Crawford, Secretary of State, of the State of Florida, do hereby certify that M. R. Cooper was on the 24th day of May, A. D. 1913, and still is County Judge of the County of St. Johns, State of Florida, and as such County Judge is fully authorized and empowered under the constitution and laws of the State of Florida, to admit to probate and to record all wills of decedents and codicils thereto, to take proof of the same, to issue letters testamentary, and to do and perform all matters and things pertaining to probate

220 *Exhibit A*

jurisdiction, and is fully authorized and empowered to certify under his signature and the seal of his Court, to the probating and recording of wills and codicils thereto, and to all matters and things done and performed by him in his official capacity in all matters pertaining to probate jurisdiction.

I further certify that his Court has no official clerk and that he is ex-officio clerk of his own court.

I further certify that the seal of the Court of the County Judge of St. Johns County, Florida, sitting in probate, af-
221 fixed to the foregoing, on page numbered 36 thereof, is the genuine seal of said Court, *and I verily believe that each of the signatures attested to the foregoing copy is genuine,* and I verily believe that the signature of M. R. Cooper, Judge of said Court, sitting in probate, to the aforesaid certificates concerning the probate and proofs of the will, and codicils thereto, of Henry M. Flagler, deceased, are genuine.

In Witness Whereof, I, H. Clay Crawford, Secretary of State of the State of Florida, having the legal custody of the Great Seal of the State of Florida, have hereunto set my hand and the Great Seal of the State of Florida, at Talla-
222 hassee, Florida, this 7th day of June, A. D. 1913.

(Signed) H. CLAY CRAWFORD
Secretary of State of the
State of Florida.

(State Seal of Florida)

Memorandum Opinion

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

224

JOSEPH C. WHITE, ESQ., for the petitioner.
JOHN R. WHEELER, ESQ., for the respondent.

MURDOCK: The Commissioner determined a deficiency of $11,150.47 in the petitioner's income tax for the calendar year 1936. The facts have been stipulated and the Board adopts the stipulation as its findings of fact. The petitioner sold 1,919 shares of preferred stock of Standard Oil Export Corporation in 1936. The only issue for decision is whether her basis for gain or loss on those shares is the fair market value of the predecessor stock on the date of death of Henry M. Flagler, from whom she acquired the stock by will, or the fair market value of the predecessor stock when shares 225 were distributed to her by the trustees under the will. The Commissioner has determined that the fair market value of the predecessor stock on the date of the death of the testator is the proper date. The Board has heretofore decided the point in accordance with the Commissioner's present contention on two occasions. *Elizabeth G. Augustus,* 40 B. T. A. 1200; *Richard J. Reynolds,* 41 B. T. A. 59. Although the author of the present opinion was of a different view from the majority of the Board in those cases, nevertheless the Board here follows its prior opinions.

Decision will be entered for the respondent.

Enter:

ENTERED MAY 31, 1940.

(Seal)

226

Decision

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

227

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 31, 1940, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of $11,150.47 for the year 1936.

(Signed) J. E. MURDOCK,
Member.

228

Enter:

ENTERED MAY 31, 1940.

Petition for Review of Decision of the United States Board of Tax Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Mary Flagler Cary, the Petitioner herein, a citizen of the United States with residence at 1009 Park Avenue, New York, New York, and in support of this her petition filed in pursuance of Section 1142 of the Internal Revenue Code for the review of the order and decision, hereinafter described, of the United States Board of Tax Appeals rendered on May 31, 1940, respectfully shows to this Honorable Court as follows:

I. STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. On August 25, 1938, the Commissioner of Internal Revenue, the Respondent herein, mailed to the Petitioner by registered mail a notice of the determination of an asserted deficiency in income tax for the calendar year 1936 in the amount of $11,150.47. On November 5, 1938, the Petitioner

232 *Petition for Review of Decision of the United States Board of Tax Appeals*

duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the re-determination of $11,084.00 of said asserted deficiency. The remainder of said asserted deficiency, being $66.47, is not in dispute.

2. Said $11,084.00 of income tax claimed by the Respondent to be due from the Petitioner resulted from the use by the Respondent, in computing basis and gain on the sale by the Petitioner in 1936 of certain stock, of the fair market value
233 as of May 20, 1913, of certain predecessor stock.

3. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, with seven codicils thereto. By said will, a trust was created to continue for a term of five years from the time of the death of the Testator and for an additional term not exceeding five years if the Testator's Florida properties should be in such a condition as "to require financial aid from someone outside of themselves * * *." Pursuant to this provision, this trust did continue for the full additional term and terminated on May 20, 1923.

234 4. By the terms of said Last Will and Testament and of the Codicils thereto the Petitioner became entitled to receive and did receive from the Trustees under said Will and Codicils subsequent to May 20, 1923, but as of that date, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

5. Said 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner from said Trustees, had been acquired by said Trustees as follows:

a. Two thousand six hundred sixty-six and two-thirds of said shares were received, with others, by

said Trustees from the Estate of the Testator as of the date of his death, namely, May 20, 1913.

b. On November 26, 1913, after said Estate was in the hands of said Trustees, a 100% stock dividend was declared by Anglo-American Oil Company, Limited. Said Trustees accordingly received as a stock dividend on December 3, 1913, 2,666⅔ additional ordinary shares of said stock.

c. In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional ordinary shares of said stock. 236
In the exercise of said rights 2,666⅔ shares were subscribed for by said Trustees at a cost of $7.50 per share. Those 2,666⅔ shares were received by said Trustees on May 1, 1918.

6. After a stock dividend in 1925 which increased Petitioner's holdings of the ordinary shares of the stock of Anglo-American Oil Company, Limited, from 8,000 to 10,666 shares, the Petitioner in a tax-free reorganization in 1930 exchanged said 10,666 ordinary shares for 1,919.88 shares of the preferred stock of Standard Oil Export Corporation.

7. In May, 1936, the Petitioner sold 1,919 shares of the preferred stock of Standard Oil Export Corporation. 237

8. The Petitioner contended in her appeal before the Board that the basis for the computation of gain or loss under Section 113(a)(5) of the Revenue Act of 1936 on the sale of the Standard Oil Export Corporation preferred stock sold by her in 1936 was the fair market value of the predecessor stock on May 20, 1923, the date when the Petitioner first obtained possession, control, enjoyment, and substantial ownership of said predecessor stock.

9. The Respondent contended that the basis for the computation of gain or loss on said sale of said Standard Oil

238 *Petition for Review of Decision of the United States Board of Tax Appeals*

Export Corporation preferred stock was the fair market value of the predecessor stock on May 20, 1913, the date of death of the Testator.

10. On May 31, 1940, the Board promulgated its memorandum findings of fact and opinion wherein it decided in accordance with the contention of the Respondent that the basis for the computation of gain or loss was the fair market value on the date of death of the Testator.

239 11. On May 31, 1940, the Board rendered, and entered in its records, an order and decision in accordance with its said opinion whereby it ordered and decided that there is a deficiency in income tax of the Petitioner for the year 1936 in the amount of $11,150.47.

II. DECLARATION OF THE COURT IN WHICH THE REVIEW IS SOUGHT.

The Petitioner, feeling aggrieved by said order and decision, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in
240 which Circuit is located the office of the Collector of Internal Revenue to which was made the return in respect of which the liability involved in the appeal arises.

III. ASSIGNMENTS OF ERRORS.

The Petitioner as a basis for the review of said order and decision makes the following assignments of errors:

1. The Board erred in that it decided and held that in determining the basis of the Petitioner for the computation of gain or loss on the sale in 1936 of the preferred stock of Standard Oil Export Corporation there should be used the

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fair market value of the predecessor stock on the date of death of said Henry M. Flagler under the will of whom she acquired the predecessor stock.

2. The Board erred in that it did not decide and hold that the basis of the Petitioner for the computation of gain or loss on the sale in 1936 of the preferred stock of Standard Oil Export Corporation was the fair market value of the predecessor stock on the date when the Petitioner became entitled to receive said predecessor stock from the testamentary trustees under the will of said Henry M. Flagler.

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3. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,919 shares of preferred stock of Standard Oil Export Corporation is the fair market value on May 20, 1923, of its predecessor stock, on which date the testamentary trust created under the will of said Henry M. Flagler terminated, and as of which date the Petitioner received said predecessor stock.

4. The Board erred in that it decided and held that in determining the basis of said 1,919 shares of preferred stock of Standard Oil Export Corporation sold in 1936 there should be used the fair market value of the predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

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5. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the "time of * * * acquisition" of the property involved in this proceeding and acquired by the Petitioner by bequest is the date upon which she obtained possession, enjoyment, control, and substantial ownership of such property.

244 *Petition for Review of Decision of the United States Board of Tax Appeals*

6. The Board erred in that it decided and held that under Section 113(a)(5) of the Revenue Act of 1936 the "time of * * * acquisition" of the property involved in this proceeding was May 20, 1913.

7. The Board erred in that it decided that "time of such acquisition," as used in Section 113(a)(5) of the Revenue Act of 1936, means the date of death of the decedent as to all property acquired from the decedent "by bequest, devise, or inheritance," regardless of whether title to the property
245 thus acquired as of the date of death of decedent was contingent or vested.

8. The Board erred in that it did not decide and hold that the Petitioner first acquired possession, enjoyment, control, and substantial ownership of the property involved in this proceeding on May 20, 1923, the effective date of the transfer to the Petitioner by the testamentary trustees.

9. The Board erred in that it did not decide and hold that the bequest to the Petitioner was contingent and did not vest in her until she was entitled to receive the predecessor stock on the termination of the trust created by the will
246 of said Henry M. Flagler.

10. The Board erred in that it did not decide and hold that there was no deficiency due by the Petitioner in respect to her income tax for the calendar year 1936 other than the deficiency of $66.47 which is not in controversy.

11. The Board erred in that it decided and held that there was a deficiency in income tax of the Petitioner for the calendar year 1936 in the amount of $11,150.47.

12. The Board erred in deciding and holding contrary to the law.

Petition for Review of Decision of the United States Board of Tax Appeals 247

13. The Board erred in deciding and holding contrary to the evidence.

WHEREFORE, your Petitioner prays that said order and decision of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

MARY FLAGLER CARY,
Petitioner,
By JOSEPH C. WHITE,
Joseph C. White
Attorney of Record for
Petitioner. 248

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH C. WHITE, being first duly sworn, deposes and says that he is the attorney of record for Mary Flagler Cary, the petitioner herein, and as such is duly authorized to verify the above petition for review; that he has read said petition; that the facts therein set forth are true to the best of his knowledge, information and belief; and that said petition is filed in good faith. 249

JOSEPH C. WHITE

Subscribed and sworn to before
me this 23rd day of August, 1940.

JOHN C. BARNWELL
John C. Barnwell
Notary Public, Bronx County
Bronx Co. Clk's No. 266, Reg No. 279B41
Certificates Filed in
N. Y. Co. Clk's No. 1467 Reg. No. 1B370
Kings Co. Clk's No. 137 Reg. No. 1536
Commission Expires March 30, 1941
[NOTARIAL SEAL]

250 **Notice of Filing Petition for Review**

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A.

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

251 COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To:

GUY T. HELVERING, ESQ.,
Commissioner of Internal Revenue,
Washington, D. C.

SIR:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, Mary Flagler Cary, the petitioner in the above-entitled proceeding, filed with the Clerk of the United States Board of
252 Tax Appeals the petition of said petitioner, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Second Circuit of the order and decision of said Board rendered and entered in its records in the above-entitled proceeding on May 31, 1940.

New York, N. Y., August 27, 1940.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of August, 1940.

JOHN P. WENCHEL,
John P. Wenchel
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent.

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Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from August , 1940, the date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been so filed was served upon the respondent in said proceeding, transmit

256 *Praecipe for Record*

and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The docket entries of the proceedings before the Board in the above-entitled proceeding;

2. The petition, together with exhibit thereto, in said proceeding for redetermination of the deficiency of income tax;

3. The answer of the respondent in said proceeding;

257 4. The stipulation of facts and exhibit thereto introduced at the hearing;

5. The memorandum findings of fact and opinion entered May 31, 1940;

6. The order and decision of the Board entered in its records May 31, 1940;

7. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit;

8. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof
258 on the respondent in said proceeding;

9. This praecipe for record;

10. The notice of the filing of this praecipe for record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding.

New York, N. Y.,
August , 1940.

JOSEPH C. WHITE,
Joseph C. White
Attorney for Petitioner.

Notice of Filing of Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To:

JOHN P. WENCHEL, Esq.,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for the Respondent,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, the undersigned attorney for the petitioner in the above-entitled proceeding has filed with the Clerk of the United States Board of Tax Appeals the praecipe for record, of which a copy is annexed hereto.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

New York, N. Y.,
August 27, 1940.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL,
John P. Wenchel,
Chief Counsel for the
Bureau of Internal Revenue,
Attorney for the Respondent.

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Clerk's Certificate

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, 266

Respondent.

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 104, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of Sept., 1940. 267

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(Seal)

268 **Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B.T.A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

269 *against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

B.T.A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

270

B.T.A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts 271

B.T.A. Docket No. 96237

JEAN LOUISE MATTHEWS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER 272

IT IS HEREBY STIPULATED AND AGREED by and between the above-named petitioners, by their attorney of record, Joseph C. White, and the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General of the United States, as follows:

The above four cases involve an identical question of law and were consolidated for purposes of the Brief and Argument before the United States Board of Tax Appeals.

Separate stipulations of facts and separate records were made in the United States Board of Tax Appeals in each of the above four cases. A part of the stipulation of facts in 273 each of the above four cases was an exhibit consisting of a certified copy of the Last Will and Testament, with codicils thereto, of Henry M. Flagler. This exhibit is sixty-five mimeographed pages long and the parties hereto agree, in order to avoid unnecessary printing expense, that this exhibit, a part of the stipulation of facts in each of the above four cases before the United States Board of Tax Appeals, may be printed only once, to wit, in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue,* which case has the lowest Docket Number in the United States Board of Tax Appeals, when the cases come on for

274 *Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts*

appeal before the United States Circuit Court of Appeals for the Second Circuit. In lieu of the printing of the above-mentioned exhibit in the other three records a copy of this Stipulation and Order will be printed in those records and cross references made to the exhibit printed in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue.*

IT IS FURTHER AGREED by and between the parties hereto that the above four cases may be consolidated for purposes
275 of the Brief in the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH C. WHITE
Joseph C. White,
Attorney for Petitioners.

SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General of the United States

So ordered:

276 Dated October 24, 1940.

THOMAS W. SWAN
U. S. C. J.

[fol. 93] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

(Argued January 8, 1941. Decided January 17, 1941)

Nos. 145-6-7-8

MARY FLAGLER CARY, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

[fol. 94] JEAN LOUISE MATTHEWS, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On appeal from four orders of the Board of Tax Appeals fixing deficiencies in income taxes for the years 1934 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Roswell L. Gilpatric for the Petitioners.
Helen R. Carloss for the Respondent.

PER CURIAM:

Orders affirmed on the authority of Van Vranken v. Helvering, 115 Fed. (2) 709 (C. C. A. 2).

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

MARY FLAGLER CARY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 96] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Mary Flagler Cary, v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1941. D. E. Roberts, Clerk.

[fol. 97] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 98] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 684.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 735

HARRY HARKNESS FLAGLER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries

DOCKET No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:

For Petitioner: JOSEPH C. WHITE, Esq., RICHARD H. WILMER, Esq.,

For Respondent: JOHN R. WHEELER, Esq.

DOCKET ENTRIES:

1938

Nov. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 23—Copy of petition served on General Counsel.

1939

Jan. 17—Answer filed by General Counsel.

Jan. 17—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 20—Notice issued placing proceeding on New York City Calendar. Copy of answer and request served.

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

Nov. 14—Hearing had before Mr. Murdock on the merits. Submitted. Consolidated with 96066, 96236-7. Stipulation of facts filed. Briefs due in 60 days—replies due 15 days.

4 *Docket Entries*

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as counsel filed.

Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 18—Brief filed by taxpayer.

Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

5

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served.

May 31—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

6

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

MR. HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at Millbrook, Dutchess County, New York. The return for the period here involved was filed with the Collector for the Fourteenth District of New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938.

3. The taxes in controversy are income taxes for the calendar years 1934 and 1936 and in the amount of $20,687.23.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(1) Substitution as the tax basis of stock sold in 1934 and 1936 of an alleged value as of May 20, 1913,

10 *Petition*

of such stock in lieu of the tax basis reported by the petitioner which was based upon the values of such stock as of the dates it was received (April 26, 1921, and May 20, 1923) rather than as of the date of death (May 20, 1913) of the testator from whose estate it was received.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident
11 of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

"I have been for many years investing in railroads,
12 hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

> "The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

> "During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:
>
> "1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dol-

16 lars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annu[illegible]y and that hereinafter by subsequent clause of this ite[illegible] provided for, as shall not be required during the extended or second period of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

17 "At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

(f) The petitioner herein is the Harry Harkness Flagler referred to in the foregoing quotation from Item Seventh of said last will and testament.

(g) Item Ninth of said last will and testament provided as follows:

18 "All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and

property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the cour[illegible] of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust. 20

* * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the State of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall 21

be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Second of the codicil of said Henry M. Flagler dated April 28, 1904, provided as follows:

"I wish further to say, in explanation of the provision made in Item numbered 'Seventh' of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time
23 of my death or at the time of the expiration of the trust therein referred to, such expression 'expiration of said trust' to be understood as explained in the Item numbered 'First' of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate."

(j) Item Third of the codicil of said Henry M. Flagler dated January 8, 1906, provided in part as follows:

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

24 "In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(k) Items First and Second of the codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

> "Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.
>
> "Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the owership thereof, as I have heretofore or may hereafter exercise and pay for.
>
> "It is my will that the legacy and bequest, to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate."

(l) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

(m) On or about April 26, 1921, said Trustees delivered, assigned and transferred to the petitioner 10,000 ordinary

shares of the stock of Anglo-American Oil Company, Limited, the fair market value of which on such date was $18.75 per share. In 1925 the petitioner received a stock dividend of 3,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of said 10,000 ordinary shares. On or about January 31, 1930, such 13,333 ordinary shares were exchanged for 2,400 shares of the preferred stock of Standard Oil Export Corporation.

(n) In December, 1934, the petitioner sold 500 of said 2,400 shares of the preferred stock of Standard Oil Export
29 Corporation, for which he received the net amount of $54,962.50.

(o) The tax basis of said 500 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of April 26, 1921, of $18.75 per share of the ordinary shares of Anglo-American Oil Company, Limited was $39,062.50.

(p) On or about May 20, 1923, said Trustees delivered, assigned and transferred to the petitioner 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited the fair market value of which on such date was $15.375
30 per share. In 1925 the petitioner received a stock dividend of 1,667 ordinary shares of the stock of Anglo-American Oil Company, Limited in respect of said 5,000 ordinary shares. On or about January 31, 1930, such 6,667 ordinary shares were exchanged for 1,200 shares of the preferred stock of Standard Oil Export Corporation.

(q) In May, 1936, the petitioner sold 1,196 of said 2,400 shares of the preferred stock of Standard Oil Export Corporation and said 1,200 shares of the preferred stock of Standard Oil Export Corporation together with 36 such shares not involved in this proceeding, for all which 2,432 shares he received the net amount of $272,228.50.

31

(r) The tax basis of said 36 shares of the preferred stock of Standard Oil Export Corporation is not questioned in this proceeding and was $1,287.50. The tax basis of said 1,196 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of April 26, 1921, of $18.75 per share of the ordinary shares of Anglo-American Oil Company, Limited was $93,437.50. The tax basis of said 1,200 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value of May 20, 1923, of $15.375 per share of the ordinary shares of Anglo-American Oil Company, was $76,875.00. The aggregate tax basis of said 2,432 shares on the foregoing basis was $171,600,00.

32

WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable years herein involved, and grant such other and further relief as the Board shall deem proper.

JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for Petitioner.

33

STATE OF NEW YORK,
COUNTY OF } ss.:

HARRY HARKNESS FLAGLER being duly sworn deposes and says:

That he is the petitioner above named; that he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein; and that the

34 *Exhibit A*

statements contained herein are true except those stated to be on information and belief and that those he believes to be true.

(S) HARRY HARKNESS FLAGLER

Subscribed and sworn to before me
this 21st day of November, 1938.

(S) WALTER F. HAIGHT
Notary Public
Commission expires March 30, 1939

35 (Seal)

EXHIBIT A

Letterhead of

TREASURY DEPARTMENT

Aug. 25, 1938

IT:A:1
JMF:90D

36 Mr. Harry Harkness Flagler,
32 Park Avenue,
New York, New York.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 and 1936 discloses a deficiency of $20,687.23 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Exhibit A

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By W. T. SHERWOOD
Acting Deputy Commissioner

Enclosure:

Statement
Form of waiver

40

STATEMENT

IT:A:1
JMF:90D

Mr. Harry Harkness Flagler,
32 Park Avenue,
New York, New York

Tax Liability for Taxable Years Ended
December 31, 1934 and 1936
Income Tax

Year	*Liability*	*Assessed*	*Deficiency*
41 1934	$93,094.65	$90,178.08	$2,916.57
1936	226,741.70	208,971.04	17,770.66
Totals	$319,836.35	$299,149.12	$20,687.23

In making this determination of your income tax liability careful consideration has been given to the reports of examinations dated March 25, 1938; to your protest dated May 2, 1938 and to the statements made at the conference held on June 24, 1938.

A copy of this letter and enclosures has been mailed to your representative Mr. Joseph C. White, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

42

1934

Adjustments to Net Income

Income as disclosed by return	$220,433.49
Unallowable deductions and additional income:	
(a) Capital gain	6,354.17
Total	$226,787.66
Nontaxable income and additional deductions:	
(b) Contributions	953.12
Net income adjusted	$225,834.54

Statement

Explanation of Adjustments

(a) The facts show that you received 10,000 shares Anglo-American Oil stock plus a stock dividend of 33⅓ percent making a total of 13,333 shares having a cost basis to the decedent of $6.4375 per share. This stock was exchanged in 1930 on the basis of 5⅝ shares for one share of Standard Oil Export Preferred stock resulting in 2,400 shares with a basis of $35.7638 per share, or a total value of $85,833.33. Inasmuch as the correct cost basis of 500 shares preferred stock of Standard Oil Export Preferred stock sold is $17,881.94 instead of $39,062.50, the fair market value at date of distribution as reported, there is an increase in capital gain of $21,180.56. Since the original stock was held more than ten years the increase in taxable gain is 30 percent of this amount or $6,354.17. Section 113(a)(5) of the Revenue Act of 1934 provides as follows:

> "Property Transmitted at Death—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The term acquisiiton is defined in article 113(a)(5) as, "* * * the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property." The basis for computation of gain or loss upon sale of the stock in question is therefore held to be the fair market value as at date of death of decedent.

(b) In view of the increase in income the deduction for charitable contributions has been increased to 15 percent of the net income without the benefit of this deduction in accordance with section 23(o) of the Revenue Act of 1934.

46 *Statement*

Computation of Tax

Net income adjusted		$225,834.54
Less:		
Personal exemption		2,500.00
Surtax net income		$223,334.54
Less:		
47 Dividends	$299,656.51	
Interest on United States obligations	212.50	
Earned income credit (10% of $3,000.00)	300.00	300,169.01
Balance subject to normal tax		None
Surtax on $223,334.54		$ 93,100.65
Less:		
Income tax paid at source		6.00
Income tax liability		$ 93,094.65
Tax previously assessed, account #200426		90,178.08
48 Deficiency		$ 2,916.57

1936

Adjustment to Net Income

Net income as disclosed by return	$365,532.20
Unallowable deductions and additional income:	
(a) Capital gain	25,386.67
Net income adjusted	$390,918.87

Statement 49

Explanation of Adjustment

(a) The increase in capital gain is caused by using as the cost basis for 2,432 shares Standard Oil Export Preferred stock the fair market value as at date of death May 20, 1913, of the original for purpose of sale instead of a value of $171,600.00 as at May 20, 1923, date of distribution. The adjustment is made in accordance with the provisions of the Revenue Act of 1936, under the authority explained in detail above with respect to the Revenue Act of 1934 as applied to the taxable year ending December 31, 1934. 50

Computation of Tax

Net income adjusted		$390,918.87
Less:		
Personal exemption		1,250.00
Surtax net income		$389,668.87
Less:		
Interest on United States obligations	$212.50	
Earned income credit (10% of $3,000.00)	300.00	512.50 51
Balance subject to normal tax		$389,156.37
Normal tax at 4% on $389,156.37		$ 15,566.25
Surtax on $389,668.87		211,181.45
Total tax		$226,747.70
Less:		
Income tax paid at source		6.00
Income tax liability		$226,741.70
Tax previously assessed, account #201605		208,971.04
Deficiency		$ 17,770.66

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Answer

UNITED STATES BOARD OF TAX APPEALS

MR. HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

53

Docket No. 96235.

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes
54 for the years 1934 and 1936 but denies that the full amount proposed in the deficiency letter is in controversy.

4. Denies the allegations of error contained in Paragraph 4 of the petition.

5. (a) Admits the allegations contained in sub-paragraph (a) of Paragraph 5 of the petition.

(b) Admits the allegations contained in sub-paragraph (b) of Paragraph 5 of the petition.

(c) Admits the allegations contained in sub-paragraph (c) of Paragraph 5 of the petition.

(d) Admits the allegations contained in sub-paragraph (d) of Paragraph 5 of the petition.

(e) Admits the allegations contained in sub-paragraph (e) of Paragraph 5 of the petition.

(f) Admits the allegations contained in sub-paragraph (f) of Paragraph 5 of the petition.

(g) Admits the allegations contained in sub-paragraph (g) of Paragraph 5 of the petition.

(h) Admits the allegations contained in sub-paragraph (h) of Paragraph 5 of the petition.

(i) Admits the allegations contained in sub-paragraph (i) of Paragraph 5 of the petition.

(j) Admits the allegations contained in sub-paragraph (j) of Paragraph 5 of the petition.

(k) Admits the allegations contained in sub-paragraph (k) of Paragraph 5 of the petition.

(l) Denies the allegations contained in sub-paragraph (l) of Paragraph 5 of the petition.

(m) Admits that on or about April 26, 1921 there were delivered to petitioner 10,000 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that thereafter petitioner received a stock dividend of 3,333 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that in 1930 all of said 13,333 ordinary shares of Anglo-American Oil Company stock was exchanged for 2,400 shares of preferred stock of Standard Oil Export Corporation; denies the remaining allegations contained in sub-paragraph (m) of Paragraph 5 of the petition.

(n) Admits the allegations contained in sub-paragraph (n) of Paragraph 5 of the petition.

(o) Denies the allegations contained in sub-paragraph (o) of Paragraph 5 of the petition.

58 *Answer*

(p) Admits that on or about April 20, 1923. there was delivered to petitioner 5,000 ordinary shares of stock of Anglo-American Oil Company, Ltd.; admits that thereafter petitioner received a stock dividend on said stock of 1,667 shares of Anglo-American Oil Company stock. Admits that in 1930 all of said 6,667 shares of Anglo-American Oil Company stock was exchanged for 1,200 shares of preferred stock of Standard Oil Export Corporation; denies the remaining allegations contained in sub-paragraph (p) of Paragraph 5 of the petition.

59 (q) Admits and alleges that in May, 1936, petitioner sold 2,432 shares of Standard Oil Export Corporation stock acquired from the estate of Henry M. Flagler, the total selling price being $272,228.50. Denies the remaining allegations of sub-paragraph (q) of Paragraph 5 of the petition.

(r) Denies the allegations contained in sub-paragraph (r) of Paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

60

Signed J. P. WENCHEL, ECA.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. G. HANSON,
Division Counsel.

GEORGE R. SHERRIFF,
Special Attorney,
Bureau of Internal Revenue.

G.R.S./rg 1/13/39

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Stipulation of Facts

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

62

It is hereby stipulated and agreed by and between the Petitioner and the Respondent by their respective attorneys of record that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Petitioner is an individual with residence at Millbrook, Dutchess County, New York. The returns for the periods here involved were filed with the Collector of Internal Revenue for the Fourteenth District of New York. 68

2. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, and seven codicils dated, respectively, February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in the Court of County Judge in and for St. Johns County, Florida, on May 24, 1913. A copy of said last will and testament and codicils thereto, together with the probate proceedings thereon, marked Exhibit A, is attached hereto and made a part hereof.

64 *Stipulation of Facts*

3. Pursuant to Items Third and Fifth of said last will and testament, a trust was created covering substantially the whole of the estate of the Testator, including stock of Anglo-American Oil Company, Limited, hereinafter referred to.

4. By Item Fifth of said last will and testament, said trust was to continue for a term of five years from the time of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties
65 should be in such condition as "to require financial aid from someone outside of themselves * * *."

5. Pursuant to the provisions of Item Fifth of said last will and testament, said trust did continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923.

6. The Petitioner, Harry Harkness Flagler, was the only son of the Testator, and is the individual referred to in said last will and testament and codicils thereto as Harry Harkness Flagler and "my son" or "my said son."

66 7. Item Seventh of said last will and testament provided in part as follows:

> "At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

Items First of the codicil of September 13, 1912, provided that said shares of Standard Oil Stock should include any property issued or received in its place and stead.

8. Pursuant to the decree of the Circuit Court, Eastern District of Missouri, in the case of *U. S.* v. *Standard Oil Co. N. J. et al.*, 173 Fed. 177 (1909), and affirmed with modifications by the Supreme Court of the United States, in the case of *The Standard Oil Company of New Jersey* v. *The United States*, 221 U. S. 1, providing for the disintegration of the Standard Oil Co. of New Jersey, there was issued to and received by the stockholders of said Standard Oil Co. of New Jersey one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Co. of New Jersey.

9. Said trustees under the will of the Testator received, among other things, 15,000 shares of the stock of Anglo-American Oil Company, Limited, which shares are involved in this proceeding, as follows:

(a) Five thousand of said shares were received, with others, by said trustees as of the date of death of the Testator, namely, May 20, 1913;

(b) On November 26, 1913, after the estate of the Testator was in the hands of said trustees, a 100% stock dividend was declared by the Anglo-American Oil Company, Limited. Said trustees accordingly received as a stock dividend, on December 3, 1913, 5,000 additional ordinary shares of said stock;

(c) In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional shares of the ordinary stock of said Company. In the exercise of said rights 5,000 shares were subscribed for by said trustees at $7.50 per share. Those 5,000 shares were received by said trustees on May 1, 1918.

10. (a) The trustees, on April 26, 1921, determined that it was no longer necessary to hold 10,000 ordinary shares of

70 *Stipulation of Facts*

the stock of Anglo-American Oil Company, Limited, as part of the corpus of said trust. On April 26, 1921, sa trustees delivered, assigned and transferred to the Petition 10,000 ordinary shares of the stock of Anglo-American Company, Limited. Said 10,000 shares were a part of t 15,000 ordinary shares of the stock of Anglo-American Company, Limited, described in paragraph 9 hereof.

(b) In 1925, the Petitioner received a stock dividend 3,333 ordinary shares of stock of Anglo-American Oil Co pany, Limited, in respect of said 10,000 ordinary shares.

71 (c) On or about January 31, 1930, such 13,333 ordina shares were exchanged, in a tax-free reorganization, 2,400 shares of the preferred stock of Standard Oil Exp Corporation (5% shares of Anglo-American Oil Compa Limited, stock for one share of preferred stock of Standa Oil Export Corporation).

(d) In December, 1934, the Petitioner sold 500 of sa 2,400 shares of the preferred stock of Standard Oil Exp Corporation, for which he received the net amount $54,962.50.

72 11. (a) Subsequent to May 20, 1923, but as of that da said trustees transferred to the Petitioner, pursuant to provisions of said last will and testament and codicils, amo other things, 5,000 ordinary shares of the stock of Ang American Oil Company, Limited, which had theretofore be held by said trustees in trust as aforesaid. Said 5,000 sha were the remainder of the 15,000 ordinary shares of the st of Anglo-American Oil Company, Limited, described in pa graph 9 hereof.

(b) In 1925, the Petitioner received a stock dividend 1,667 ordinary shares of the stock of Anglo-American Company, Limited, in respect of said 5,000 ordinary sha

(c) On or about January 31, 1930, such 6,667 ordinary shares were exchanged in a tax-free reorganization for 1,200 shares of the preferred stock of Standard Oil Export Corporation (5⅝ shares of Anglo-American Oil Company, Limited, stock for one share of preferred stock of Standard Oil Export Corporation).

12. In May, 1936, the Petitioner sold 2,432 shares of the preferred stock of Standard Oil Export Corporation, for which he received the net amount of $272,228.50. Said shares had been acquired as follows:

(a) One thousand one hundred ninety-six of said shares were a part of said 2,400 shares received in exchange for said 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited (plus the stock dividend of 3,333 ordinary shares declared thereon), received by the Petitioner on or about April 26, 1921;

(b) One thousand two hundred of said shares had been acquired in exchange for the 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited (plus the stock dividend of 1,667 shares declared thereon), received by the Petitioner as of May 20, 1923;

(c) Thirty-six of said shares are not involved in this proceeding. The tax basis of said 36 shares was $1,287.50.

13. The market value of the ordinary shares of the stock of Anglo-American Oil Company, Limited, as of April 26, 1921, was $18.75 per share.

14. The market value of the ordinary shares of the stock of Anglo-American Oil Company, Limited, on May 20, 1923, was $15.25 per share.

Exhibit A

15. The market value on May 20, 1913, for the ordinary shares of the stock of Anglo-American Oil Company, Limited, was $18.25 per share.

Dated, New York, N. Y., November 13, 1939.

JOSEPH C. WHITE
Attorney for Petitioner

J. P. WENCHEL
ECA
Attorney for Respondent

EXHIBIT A

Certified Copy of

LAST WILL AND TESTAMENT

WITH CODICILS THERETO

of

HENRY M. FLAGLER,

Deceased

Omitted in this record pursuant to order printed at pp. 44-46 herein. Printed in the record of *Mary Flagler Cary* v. *Commissioner of Internal Revenue* at pp. 22-74.

Memorandum Opinion

UNITED STATES BOARD OF TAX APPEALS

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 96235.

Joseph C. White, Esq., for the petitioner.

John R. Wheeler, Esq., for the respondent.

MURDOCK: The Commissioner determined deficiencies of $2,916.57 and $17,770.66 in the petitioner's income tax for the calendar years 1934 and 1936. The facts have been stipulated and the Board adopts the stipulation as its findings of fact. The petitioner sold 500 shares of preferred stock of Standard Oil Export Corporation in 1934 and he sold 1,196 shares of the same kind of stock in 1936. The only issue for decision is whether his basis for gain or loss on those shares is the fair market value of predecessor stock on the date of the death of Henry M. Flagler, from whom he acquired the stock by will, or the fair market value of the predecessor stock when shares were distributed to him by the trustees under the will. The Commissioner has determined that the fair market value of the predecessor stock on the date of the death of the testator is the proper date. The Board has heretofore decided the point in accordance with the Commissioner's present contention on two occasions. *Elizabeth G. Augustus*, 40 B. T. A. 1200; *Richard J. Reynolds*, 41 B. T. A. 59. Although the author of the present opinion was of a

82 *Decision*

different view from the majority of the Board in those cases, nevertheless the Board here follows its prior opinions.

Decision will be entered for the respondent.

Enter:

ENTERED MAY 31, 1940

Decision

83 UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

84 Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 31, 1940, it is

ORDERED AND DECIDED: That there are deficiencies in income tax for the years 1934 and 1936, in the respective amounts of $2,916.57 and $17,770.66.

Enter:

(Signed) J. E. MURDOCK
Member.

Entered May 31, 1940

85

Petition for Review of Decision of the United States Board of Tax Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, 86

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Harry Harkness Flagler, the Petitioner herein, a citizen of the United States and of the State of New York and with residence at Millbrook, Dutchess County, New York, and in support of this his petition filed in pursuance of Section 1142 of the Internal Revenue Code for the review of the order and decision, hereinafter described, of the United States Board of Tax Appeals rendered on May 31, 1940, respectfully shows to this Honorable Court as follows: 87

I. STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. On August 25, 1938, the Commissioner of Internal Revenue, the Respondent herein, mailed to the Petitioner by registered mail a notice of the determination of an asserted deficiency in income tax for the calendar years 1934 and 1936 in the total amount of $20,687.23. On November 23, 1938, the Petitioner duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the redetermination of said asserted deficiency.

88 *Petition for Review of Decision of the United States Board of Tax Appeals*

2. Said asserted deficiency in income tax claimed by the Respondent to be due from the Petitioner resulted from the use by the Respondent, in computing basis and gain on the sales by the Petitioner in 1934 and 1936 of certain stock, of the fair market value as of May 20, 1913, of certain predecessor stock.

3. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, with seven codicils thereto. By said will, a
89 trust was created to continue for a term of five years from the time of the death of the Testator and for an additional term not exceeding five years if the Testator's Florida properties should be in such a condition as "to require financial aid from someone outside of themselves * * *." Pursuant to this provision, this trust did continue for the full additional term and terminated on May 20, 1923.

4. By the terms of said Last Will and Testament and of the Codicils thereto, the Petitioner became entitled to receive and by the act of the Trustees under said Will and Codicils did receive from said Trustees on April 26, 1921,
90 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

5. By the terms of said Last Will and Testament and of the Codicils thereto the Petitioner became entitled to receive and did receive from said Trustees subsequent to May 20, 1923, but as of that date, 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

6. The aggregate of 15,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner from said Trustees as set forth in paragraphs 4 and 5 hereof, had been acquired by said Trustees as follows:

91

a. Five thousand of said shares were received with others, by said Trustees from the Estate of the Testator as of the date of his death, namely May 20, 1913.

b. On November 26, 1913, after said Estate was in the hands of said Trustees, a 100% stock dividend was declared by Anglo-American Oil Company, Limited. Said Trustees accordingly received as a stock dividend on December 3, 1913, 5,000 additional ordinary shares of said stock.

c. In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional ordinary shares of said stock. In the exercise of said rights 5,000 shares were subscribed for by said Trustees at a cost of $7.50 per share. Those 5,000 shares were received by said Trustees on May 1, 1918.

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7. After a stock dividend in 1925 which increased Petitioner's holdings of the ordinary shares of the stock of Anglo-American Oil Company, Limited, from 15,000 to 20,000 shares, the Petitioner in a tax-free reorganization in 1930 exchanged said 20,000 ordinary shares for 3,600 shares of the preferred stock of Standard Oil Export Corporation.

8. In December, 1934, the Petitioner sold 500 shares of the preferred stock of Standard Oil Export Corporation. In May, 1936, the Petitioner sold 2,432 shares of said stock, of which 2,396 shares are involved in this proceeding.

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9. The basis of the 500 shares of the preferred stock of Standard Oil Export Corporation so sold by the Petitioner in December, 1934, is to be determined by reference to the 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner as described in paragraph 4 hereof and the basis of the 2,396 shares of

94 *Petition for Review of Decision of the United States Board of Tax Appeals*

said preferred stock so sold in May, 1936, is to be determined as to 1,196 thereof by reference to said 10,000 ordinary shares and as to 1,200 thereof by reference to the 5,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by the Petitioner as described in paragraph 5 hereof.

10. The Petitioner contended in his appeal before the Board that the basis for the computation of gain or loss under Section 113(a)(5) of the Revenue Acts of 1934 and
95 1936 on the sale of the Standard Oil Export Corporation preferred stock sold by him in 1934 and 1936 was the fair market values, respectively, of the predecessor stock on April 26, 1921, and May 20, 1923, the dates when the Petitioner first obtained possession, control, enjoyment, and substantial ownership of said predecessor stock.

11. The Respondent contended that the basis for the computation of gain or loss on said sales of said Standard Oil Export Corporation preferred stock was the fair market value of the predecessor stock on May 20, 1913, the date of death of the Testator.

96 12. On May 31, 1940, the Board promulgated its memorandum findings of fact and opinion wherein it decided in accordance with the contention of the Respondent that the basis for the computation of gain or loss was the fair market value on the date of death of the Testator.

13. On May 31, 1940, the Board rendered, and entered in its records, an order and decision in accordance with its said opinion whereby it ordered and decided that there are deficiencies in income tax of the Petitioner for the years 1934 and 1936 in the respective amounts of $2,916.57 and $17,770.66.

Petition for Review of Decision of the United States Board of Tax Appeals

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II. DECLARATION OF THE COURT IN WHICH THE REVIEW IS SOUGHT.

The Petitioner, feeling aggrieved by said order and decision, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in which Circuit is located the office of the Collector of Internal Revenue to which were made the returns in respect of which the liability involved in the appeal arises.

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III. ASSIGNMENTS OF ERRORS.

The Petitioner as a basis for the review of said order and decision makes the following assignments of errors:

1. The Board erred in that it decided and held that in determining the basis of the Petitioner for the computation of gain or loss on the sales in 1934 and 1936 of the preferred stock of Standard Oil Export Corporation there should be used the fair market value of the predecessor stock on the date of death of said Henry M. Flagler under the will of whom he acquired the predecessor stock.

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2. The Board erred in that it did not decide and hold that the basis of the Petitioner for the computation of gain or loss on the sales in 1934 and 1936 of the preferred stock of Standard Oil Export Corporation was the fair market value of the predecessor stock on the respective dates when the Petitioner received, or became entitled to receive, said predecessor stock from the testamentary trustees under the will of said Henry M. Flagler.

3. The Board erred in that it did not decide and hold that under Section 113(a) (5) of the Revenue Act of 1934 the

basis for the computation of gain or loss upon the sale in 1934 by petitioner of 500 shares of preferred stock of Standard Oil Export Corporation is the fair market value on April 26, 1921, of its predecessor stock, which was transferred on that date to the Petitioner by the testamentary trustees under the will of said Henry M. Flagler.

4. The Board erred in that it decided and held that in determining the aforesaid basis there should be used the fair market value of predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

5. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,196 shares of preferred stock of Standard Oil Export Corporation is the fair market value on April 26, 1921, of its predecessor stock, which was transferred on that date to the Petitioner by said testamentary trustees.

6. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain or loss upon the sale in 1936 by the Petitioner of 1,200 shares of preferred stock of Standard Oil Export Corporation is the fair market value on May 20, 1923, of its predecessor stock, on which date the testamentary trust created under the will of said Henry M. Flagler terminated, and as of which date the Petitioner received said predecessor stock.

7. The Board erred in that it decided and held that in determining the basis of said 2,396 shares of preferred stock of Standard Oil Export Corporation sold in 1936 there should

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be used the fair market value of the predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

8. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Acts of 1934 and 1936 the "time of * * * acquisition" of the property involved in this proceeding and acquired by the Petitioner by bequest is the date upon which he obtained possession, enjoyment, control, and substantial ownership of such property.

9. The Board erred in that it decided and held that under Section 113(a)(5) of the Revenue Acts of 1934 and 1936 the "time of * * * acquisition" of the property involved in this proceeding was May 20, 1913.

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10. The Board erred in that it decided that "time of such acquisition," as used in Section 113(a)(5) of the Revenue Acts of 1934 and 1936, means the date of death of the decedent as to all property acquired from the decedent "by bequest, devise, or inheritance," regardless of whether title to the property thus acquired as of the date of death of decedent was contingent or vested.

11. The Board erred in that it did not decide and hold that the Petitioner first acquired possession, enjoyment, control, and substantial ownership of the property involved in this proceeding on April 26, 1921, and May 20, 1923, the effective dates of the transfers to the Petitioner by the testamentary trustees.

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12. The Board erred in that it did not decide and hold that the bequest to the Petitioner was contingent and did not vest in him until the predecessor stock was distributed to him by said testamentary trustees or until he was entitled to receive such predecessor stock on the termination of the trust created by the will of said Henry M. Flagler.

106 *Petition for Review of Decision of the United States Board of Tax Appeals*

13. The Board erred in that it did not decide and hold that there were no deficiencies due by the Petitioner in respect to his income tax for the calendar years 1934 and 1936.

14. The Board erred in that it decided and held that there were deficiencies in income tax of the Petitioner for the calendar year 1934 in the amount of $2,916.57 and the calendar year 1936 in the amount of $17,770.66.

15. The Board erred in deciding and holding contrary
107 to the law.

16. The Board erred in deciding and holding contrary to the evidence.

WHEREFORE, your Petitioner prays that said decision and order of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

HARRY HARKNESS FLAGLER,
Petitioner,

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By JOSEPH C. WHITE
Joseph C. White,
Attorney of Record for Petitioner.

Petition for Review of Decision of the United States Board of Tax Appeals

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH C. WHITE, being first duly sworn, deposes and says that he is the attorney of record for Harry Harkness Flagler, the petitioner herein, and as such is duly authorized to verify the above petition for review; that he has read said petition; that the facts therein set forth are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

JOSEPH C. WHITE

Subscribed and sworn to before me
this 23rd day of August, 1940.

JOHN C. BARNWELL

John C. Barnwell,
Notary Public, Bronx County
Bronx Co. Clk's No. 266, Reg. No. 279B41
Certificates Filed in
N. Y. Co. Clk's No. 1467, Reg. No. 1B870
Kings Co. Clk's No. 137 Reg. No. 1536
Commission Expires March 30, 1941

[NOTARIAL SEAL]

112 **Notice of Filing Petition for Review**

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

113 COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:

Guy T. Helvering, Esq.,
Commissioner of Internal Revenue,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, Harry Harkness Flagler, the petitioner in the above-entitled proceeding, filed with the Clerk of the United States Board
114 of Tax Appeals the petition of said petitioner, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Second Circuit of the order and decision of said Board rendered and entered in its records in the above-entitled proceeding on May 31, 1940.

New York, N. Y., August 27, 1940.

JOSEPH C. WHITE
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

ADMISSION OF SERVICE

115

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL
John P. Wenchel
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent

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Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from August , 1940, the date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been been so filed was

120 served upon the respondent in said proceeding, transmit and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The Docket entries of the proceedings before the Board in the above-entitled proceeding:

2. The petition, together with exhibit thereto, in said proceeding for redetermination of the deficiency of income tax;

3. The answer of the respondent in said proceeding;

4. The stipulation of facts and exhibit thereto introduced at the hearing;

5. The memorandum findings of fact and opinion entered May 31, 1940;

6. The order and decision of the Board entered in its records May 31, 1940;

7. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit; 122

8. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding;

9. Stipulation and Order in lieu of printing Exhibit A to Stipulation of Facts;

10. This praecipe for record;

11. The notice of the filing of this praecipe for record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding. 123

JOSEPH C. WHITE
Joseph C. White,
Attorney for petitioner.

New York, N. Y., August , 1940.

124 **Notice of Filing of Praecipe for Record**

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96235

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

125 To:

JOHN P. WENCHEL, Esq.,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for the Respondent,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, the undersigned attorney for the petitioner in the above-entitled proceeding has filed with the Clerk of the United States Board of Tax Appeals the praecipe for record, of which a copy is annexed hereto.

JOSEPH C. WHITE
Attorney for Petitioner

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New York, N. Y.
August 27, 1940.

ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL
John P. Wenchel,
Chief Counsel for the
Bureau of Internal Revenue,
Attorney for the Respondent.

Clerk's Certificate

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UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

v.

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COMMISSIONER OF INTERNAL REVNUE,

Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 112, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of September, 1940. 129

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[SEAL]

130 **Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B.T.A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

131 *against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

B.T.A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

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B.T.A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts 133

B.T.A. Docket No. 96237.

JEAN LOUISE MATTHEWS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER 134

IT IS HEREBY STIPULATED AND AGREED by and between the above-named petitioners, by their attorney of record, Joseph C. White, and the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General of the United States, as follows:

The above four cases involve an identical question of law and were consolidated for purposes of the Brief and Argument before the United States Board of Tax Appeals.

Separate stipulations of facts and separate records were made in the United States Board of Tax Appeals in each of the above four cases. A part of the stipulation of facts in 135 each of the above four cases was an exhibit consisting of a certified copy of the Last Will and Testament, with codicils thereto, of Henry M. Flagler. This exhibit is sixty-five mimeographed pages long and the parties hereto agree, in order to avoid unnecessary printing expense, that this exhibit, a part of the stipulation of facts in each of the above four cases before the United States Board of Tax Appeals, may be printed only once, to wit, in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue*, which case has the lowest Docket Number in the United States Board of Tax Appeals, when the cases come on for

136 *Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts*

appeal before the United States Circuit Court of Appeals for the Second Circuit. In lieu of the printing of the above-mentioned exhibit in the other three records a copy of this Stipulation and Order will be printed in those records and cross references made to the exhibit printed in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue.*

IT IS FURTHER AGREED by and between the parties hereto that the above four cases may be consolidated for purposes
137 of the Brief in the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH C. WHITE
Joseph C. White,
Attorney for Petitioners.

SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General of the United States

So ordered:

138 Dated October 24, 1940.

THOMAS W. SWAN
U. S. C. J.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

(Argued January 8, 1941. Decided January 17, 1941)

Nos. 145-6-7-8

MARY FLAGLER CARY, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

[fol. 48] JEAN LOUISE MATTHEWS, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On appeal from four orders of the Board of Tax Appeals fixing deficiencies in income taxes for the years 1934 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Roswell L. Gilpatric for the Petitioners.
Helen R. Carloss for the Respondent.

Per CURIAM:

Orders affirmed on the authority of Van Vranken v. Helvering, 115 Fed. (2) 709 (C. C. A. 2).

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

HARRY HARKNESS FLAGLER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry Harkness Flagler v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1941. D. E. Roberts, Clerk.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 684 and 734.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, EXECUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries 1

DOCKET NO. 96236

MRS. ANNIE L. FLAGLER,

Amended Title:

ESTATE OF ANNIE L. FLAGLER, DECEASED,
HARRY HARKNESS FLAGLER, EXECUTOR,
Petitioner,

VS. 2

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:

For Petitioner: Joseph C. White, Esq., Richard H. Wilmer, Esq.

For Respondent: John R. Wheeler, Esq.

DOCKET ENTRIES:

1938 3

Nov. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 23—Copy of petition served on General Counsel.

1939

Jan. 17—Answer filed by General Counsel.

Jan. 17—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 20—Notice issued placing proceeding on New York City Calendar. Answer and request served.

4 *Docket Entries*

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

Nov. 14—Hearing had before Mr. Murdock on the merits. Submitted. Consolidated with 96066, 96235-37. Stipulation of facts filed. Briefs due in 60 days —replies due in 15 days.

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as
5 counsel filed.

Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 17—Motion to substitute Harry Harkness Flagler as Executor of Estate of Annie L. Flagler, deceased, filed by taxpayer.

Jan. 18—Brief filed by taxpayer.

Jan. 19—Order amending title to read: Estate of Annie L. Flagler, deceased, Harry Harkness Flagler, Executor, entered.

6 Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served on General Counsel.

May 31—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Petition

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF APPEALS

DOCKET NO. 96236

MRS. ANNIE L. FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with residence at Millbrook, Dutchess County, New York. The return for the period here involved was filed with the Collector for the Fourteenth District of New York.

10 *Petition*

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938.

3. The taxes in controversy are income taxes for the calendar year 1936 and in the amount of $6,262.66.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(1) Substitution of the basis of $53,645.84 in lieu
11 of a basis of $83,468.04 in the computation of a profit on the sale of 1,500 shares of the preferred stock of Standard Oil Export Corporation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testa-
12 ment and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

> "I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive inter-

ests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

"The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

"During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:

"1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars ($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that hereinafter by subsequent clause of this item provided for, as shall not be required during the extended or second period
17 of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

"At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

(f) The petitioner herein is the donee of a gift hereinafter described from the Harry Harkness Flagler referred to
18 in the foregoing quotation from Item Seventh of said last will and testament.

(g) Item Ninth of said last will and testament provided as follows:

"All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (for-

merly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, State of New York, and my property, Number Twenty-one West Fifty-fifth Street, in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

* * * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary

assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Second of the codicil of said Henry H. Flagler dated April 28, 1904, provided as follows:

23

"I wish further to say, in explanation of the provision made in Item numbered 'Seventh' of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time of my death or at the time of the expiration of the trust therein referred to, such expression 'expiration of said trust' to be understood as explained in the Item numbered 'First' of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate."

(j) Item Third of the codicil of said Henry H. Flagler dated January 8, 1906, provided in part as follows:

24

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

"In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust

properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(k) Items First and Second of the codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

"Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.

"Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for.

"It is my will that the legacy and bequest, to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate."

(l) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

28 *Petition*

(m) On or about April 26, 1921, said Trustees delivered, assigned and transferred to said Harry Harkness Flagler 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, the fair market value of which on such date was $18.75 per share. In 1925 said Harry Harkness Flagler received a stock dividend of 3,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of said 10,000 ordinary shares. On or about January 31, 1930, such 13,333 ordinary shares were exchanged for 2,400 shares of the preferred stock of Standard Oil Export Corporation.

29

(n) On or about April 14, 1932, said Harry Harkness Flagler gave to the petitioner 704 of said 2,400 shares of the preferred stock of Standard Oil Export Corporation.

(o) In May, 1936, the petitioner sold said 704 shares, together with 796 such shares not involved in this proceeding, for all of which 1,500 shares she received the net amount of $168,328.14.

(p) The tax basis of said 704 shares of the preferred stock of Standard Oil Export Corporation based upon said fair market value on April 26, 1921, of $18.75 per share of the ordinary shares of Anglo-American Oil Company, Limited, was $55,000. The tax basis of said 796 shares which is not involved in this proceeding was $28,468.04.

30

WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable year here involved and grant such other and further relief as the Board shall deem proper.

JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for petitioner.

Exhibit A

STATE OF NEW YORK,
COUNTY OF DUTCHESS, } ss.:

ANNIE L. FLAGLER being duly sworn deposes and says:

That she is the petitioner above named; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein; and that the statements contained therein are true except those stated to be on information and belief and that those she believes to be true.

(s) ANNIE L. FLAGLER

Subscribed and sworn to before me
this 21st day of November, 1938.

(s) WALTER F. HAIGHT
Notary Public
Commission expires March 30, 1939

[SEAL]

EXHIBIT A

Letterhead of

TREASURY DEPARTMENT

IT:A:1
JMF:90D

Aug. 25, 1938

Mrs. Annie L. Flagler,
32 Park Avenue,
New York, New York.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936,

34 *Exhibit A*

discloses a deficiency of $8,468.84 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

35 Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

36

By W. T. SHERWOOD
Acting Deputy Commissioner.

Enclosures:

Statement
Form of waiver

STATEMENT

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IT:A:1
JMF:90D

Mrs. Annie L. Flagler,
32 Park Avenue,
New York, New York.

Tax Liability for Taxable Year Ended
December 31, 1936.

	Liability	*Assessed*	*Deficiency*
Income Tax	$221,389.99	$212,921.15	$8,468.84

38

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 25, 1938; to your protest dated May 2, 1938 and to the statements made at the conference held on June 24, 1938.

A copy of this letter and enclosures has been mailed to your representative Mr. Joseph C. White, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income

Net income as disclosed by return.....	$375,190.63

39

Unallowable deductions and additional income:

(a) Dividends	1,578.00
(b) Capital gain	8,946.66
(c) Taxes	1,573.70
Net income adjusted	$387,288.99

(a) This adjustment is made to include the correct amount of $3,114.00, dividends received from the Fifth Avenue Bank instead of $1,536.00 reported.

40 *Statement*

Explanation of Adjustments

(b) The increase in capital gain is caused by using $53,645.84 as a cost basis for 1,500 shares Standard Oil Export Preferred stock sold, the cost basis in the hands of Mr. Flagler from whom the stock was received as a gift in 1932. Of the 1,500 shares sold, 1,296 shares were received from Mr. Flagler which he had received in exchange in 1930 on the basis of 5 5/9 shares Anglo-American Oil stock for one share of Standard Oil Export Preferred stock having a basis of $46,350.00 for 1926 shares received. Mr. Flagler had re-
41 ceived 10,000 shares of Anglo-American Oil stock distributed by the estate of Henry M. Flagler on April 26, 1921, on which stock a 33⅓ percent stock dividend was received in 1930 making a total of 13,333 shares of this class of stock. The stock had a cost basis to the decedent of $35.7638 per share or a total cost of $85,833.33. The 13,333 shares were exchanged in 1930 for Standard Oil Export Preferred stock on the basis of 5⅝ shares of Anglo-American Oil stock for one share Standard Oil Export Preferred stock, or 2,400 shares having a correct cost basis of $85,833.33. Included in a gift of 2,000 shares from Mr. Flagler in 1932 was 704 shares of the above-mentioned stock included in 1,500 shares sold in the taxable year with a cost basis of $53,645.84. Section 113(a)(5) of
42 the Revenue Act of 1936 provides as follows:

> "Property Transmitted at Death—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The term acquisition is defined in article 113(a)(5) of Regulations 94 as "* * * the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property * * *." Since the stock in question was received as a gift from Mr. Flagler, the basis to you is

Statement 43

the same as it would be in the hands of the donor in accordance with section 113(a)(2) of the Revenue Act of 1936. Inasmuch as the amount of $83,468.04, the fair market value as at date of distribution was claimed in the return and the correct basis is $53,645.84, there is an increase in capital gain of $29,822.20. Since the original stock was held more than ten years the taxable gain is increased by 30 percent or $8,946.66.

(c) The deduction of $1,573.70 for taxes has been disallowed inasmuch as this amount applies to taxes on real estate for prior years.

44

Computation of Tax

Net income adjusted		$387,288.99
Less:		
Personal exemption		1,250.00
Surtax net income		$386,038.99
Less:		
Interest on United States obligations	$68,775.00	
Earned income credit (10% of $3,000.00)	300.00	69,075.00
Balance subject to normal tax		$316,963.99
Normal tax at 4% on $316,963.99		$ 12,678.56
Surtax on $386,038.99		208,785.73
Total tax		$221,464.29
Less:		
Income tax paid at source		74.30
Income tax liability		$221,389.99
Tax previously assessed account #201705		212,921.15
Deficiency		$ 8,468.84

45

46

Answer

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96236.

MRS. ANNIE L. FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

47

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

48

3. Admits that the taxes in controversy are income taxes for the calendar year 1936 and alleges that the full amount proposed by the deficiency letter is not in controversy.

4. Denies the error contained in Paragraph 4 of the petition.

5. (a) Admits the allegations contained in sub-paragraph (a) of Paragraph 5 of the petition.

(b) Admits the allegations contained in sub-paragraph (b) of Paragraph 5 of the petition.

(c) Admits the allegations contained in sub-paragraph (c) of Paragraph 5 of the petition.

(d) Admits the allegations contained in sub-paragraph (d) of Paragraph 5 of the petition.

(e) Admits the allegations contained in sub-paragraph (e) of Paragraph 5 of the petition.

(f) Admits that Harry Harkness Flagler made a gift to petitioner on April 14, 1932, among other shares, of 704 shares of preferred stock of Standard Oil Export Corporation.

(g) Admits the allegations contained in sub-paragraph (g) of Paragraph 5 of the petition.

(h) Admits the allegations contained in sub-paragraph (h) of Paragraph 5 of the petition.

(i) Admits the allegations contained in sub-paragraph (i) of Paragraph 5 of the petition.

(j) Admits the allegations contained in sub-paragraph (j) of Paragraph 5 of the petition.

(k) Admits the allegations contained in sub-paragraph (k) of Paragraph 5 of the petition.

(l) Denies the allegations contained in sub-paragraph (l) of Paragraph 5 of the petition.

(m) Admits that 10,000 ordinary shares of stock of Anglo-American Oil Company, Ltd. were actually delivered to petitioner on or about April 26, 1921; admits that thereafter petitioner received a stock dividend on said stock of 3,333 shares of stock of Anglo-American Oil Company, Ltd.; admits that in 1930 the total of 13,333 shares of stock of Anglo-American Oil Company, Ltd. were exchanged for 2,400 shares of preferred stock of Standard Oil Export Corpora-

tion; denies the remaining allegations contained in sub-paragraph (m) of Paragraph 5 of the petition.

(n) Admits the allegations contained in sub-paragraph (n) of Paragraph 5 of the petition.

(o) Admits the allegations contained in sub-paragraph (o) of Paragraph 5 of the petition.

(p) Denies the allegations contained in sub-paragraph (p) of Paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL
ECA

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON,
Division Counsel.

GEORGE R. SHERRIFF,
Special Attorney,
Bureau of Internal Revenue.

GRS/rg 1/12/39.

Stipulation of Facts

UNITED STATES BOARD OF TAX APPEALS

DOCKET NO. 96236

ANNIE L. FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

It is hereby stipulated and agreed by and between the Petitioner and the Respondent by their respective attorneys of record that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Petitioner is an individual with residence at Millbrook, Dutchess County, New York. The return for the period here involved was filed with the Collector of Internal Revenue for the Fourteenth District of New York.

2. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, and seven codicils dated, respectively, February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in the Court of County Judge in and for St. Johns County, Florida, on May 24, 1913. A copy of said last will and testament and the codicils thereto,

together with the probate proceedings thereon, marked Exhibit A, is attached hereto and made a part hereof.

3. Pursuant to Items Third and Fifth of said last will and testament, a trust was created covering substantially the whole of the estate of the Testator, including stock of Anglo-American Oil Company, Limited, hereinafter referred to.

4. By Item Fifth of said last will and testament, said trust was to continue for a term of five years from the time
59 of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties should be in such condition as "to require financial aid from someone outside of themselves * * *."

5. Pursuant to the provisions of Item Fifth of said last will and testament, said trust did continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923.

6. Item Seventh of said last will and testament provided in part as follows:

> "At the expiration of said trust, the Trustees shall
> 60 deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son."

Item First of the codicil of September 13, 1912, provided that said shares of Standard Oil Stock should include any property issued or received in its place and stead.

7. Pursuant to the decree of the Circuit Court, Eastern District of Missouri, in the case of *U. S.* v. *Standard Oil Co. N. J. et al.*, 173 Fed. 177 (1909), and affirmed with modifications by the Supreme Court of the United States, in the case

of *The Standard Oil Company of New Jersey* v. *The United States*, 221 U. S. 1, providing for the disintegration of the Standard Oil Co. of New Jersey, there was issued to and received by the stockholders of said Standard Oil Co. of New Jersey one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Co. of New Jersey.

8. Said trustees under the will of the Testator received, among other things, 15,000 shares of the stock of Anglo-American Oil Company, Limited, some of which shares are involved in this proceeding, as follows:

(a) Five thousand of said shares were received, with others, by said trustees as of the date of death of the Testator, namely, May 20, 1913;

(b) On November 26, 1913, after the estate of the Testator was in the hands of said trustees, a 100% stock dividend was declared by the Anglo-American Oil Company, Limited. Said trustees accordingly received as a stock dividend, on December 3, 1913, 5,000 additional ordinary shares of said stock;

(c) In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional shares of the ordinary stock of said Company. In the exercise of said rights 5,000 shares were subscribed for by said trustees at $7.50 per share. Those 5,000 shares were received by said trustees on May 1, 1918.

9. The trustees on April 26, 1921, determined that it was no longer necessary to hold 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, as a part of the corpus of said trust. On April 26, 1921, said trustees delivered, assigned and transferred to said Harry

64 *Stipulation of Facts*

Harkness Flagler 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited. These 10,000 shares were a part of the 15,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, described in paragraph 8 hereof.

10. In 1925, said Harry Harkness Flagler received a stock dividend of 3,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of said 10,000 ordinary shares.

65 11. On January 31, 1930, said 13,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, were exchanged in a tax-free reorganization for 2,400 shares of the preferred stock of Standard Oil Export Corporation (5⅝ shares of Anglo-American Oil Company, Limited, stock for one share of preferred stock of Standard Oil Export Corporation).

12. On or about April 14, 1932, said Harry Harkness Flagler made a gift of 2,000 shares of the preferred stock of Standard Oil Export Corporation to his wife, Annie L. Flagler, the Petitioner herein.

66 13. Seven hundred four of said shares were a part of the 2,400 shares of said preferred stock of the Standard Oil Export Corporation, received by Harry Harkness Flagler as above set forth.

14. In May, 1936, the Petitioner sold 1,500 shares of the preferred stock of Standard Oil Export Corporation and received therefor the net amount of $168,328.14. Included in said 1,500 shares sold on that date were the 704 shares of said preferred stock received by the Petitioner as set forth above.

Exhibit A

15. The tax basis of the remaining 796 shares of the said preferred stock of Standard Oil Export Corporation is not in controversy in this proceeding.

16. The market value of the ordinary shares of the stock of Anglo-American Oil Company, Limited, on April 26, 1921, was $18.75 per share.

17. The market value on May 20, 1913, of the ordinary shares of stock of Anglo-American Oil Company, Limited, was $18.25 per share.

Dated, New York, N. Y., November 13, 1939.

JOSEPH C. WHITE
Attorney for Petitioner

J. P. WENCHEL
ECA
Attorney for Respondent.

EXHIBIT A

CERTIFIED COPY OF

LAST WILL AND TESTAMENT

WITH CODICILS THERETO

of

HENRY M. FLAGLER,

Deceased.

Omitted in this record pursuant to order printed at pp. 41-43 herein. Printed in the record of *Mary Flagler Cary* v. *Commissioner of Internal Revenue* at pp. 22-74.

70

Order

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96236.

ANNIE L. FLAGLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

71 Respondent.

On suggestion of death of the petitioner and notice of the appointment of executor filed in the above entitled proceeding, it is

ORDERED, that Harry Harkness Flagler, Executor of the Estate of Annie L. Flagler, deceased, be and hereby is substituted as petitioner in the place and stead of Annie L. Flagler, Deceased, and that henceforth the title of this proceeding shall be Estate of Annie L. Flagler, Deceased, Harry Harkness Flagler, Executor, Petitioner, v. Commis-
72 sioner of Internal Revenue, Respondent.

(Signed) C. R. ARUNDELL
Member.

Dated—Washington, D. C.,
January 19, 1940.

73

Memorandum Opinion

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96236.

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 74

JOSEPH C. WHITE, Esq., for the petitioner.
JOHN W. WHEELER, Esq., for the respondent.

MURDOCK: The Commissioner determined a deficiency of $8,468.84 in the income tax of Annie L. Flagler for the calendar year 1936. The facts have been stipulated and the Board adopts the stipulation as its findings of fact. The decedent sold 1,500 shares of preferred stock of Standard Oil Export Corporation in 1936. The only issue for decision is whether her basis for gain or loss on those shares is the fair market value of predecessor stock on the date of death 75 of Henry M. Flagler, from whom she acquired the stock by will, or the fair market value of the predecessor stock when shares were distributed to her by the trustees under the will. The Commissionr (sic) has determined that the fiar (sic) market value of the predecessor stock on the date of the death of the testator is the proper date. The Board has heretofore decided the point in accordance with the Commissioner's present contention on two occasions. Elizabeth G. Augustus, 40 B. T. A. 1200; Richard J. Reynolds, 41 B. T. A. 59. Although the author of the present opinion was of a different view from the majority of the Board in

76 *Decision*

those cases, nevertheless the Board here follows its prior opinions.

Decision will be entered for the respondent.

Enter:

ENTERED MAY 31, 1940

Decision

77

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96236.

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

78 Respondent.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 31, 1940, it is

ORDERED and DECIDED: That there is a deficiency in income tax of $8,468.84 for the year 1936.

Enter:

(Signed) J. E. MURDOCK
Member.

ENTERED MAY 31 1940

Petition for Review of Decision of the United States Board of Tax Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Harry Harkness Flagler, Executor of the Estate of Annie L. Flagler, deceased, the Petitioner herein, a citizen of the United States and of the State of New York and a resident of Millbrook, Dutchess County, New York, and in support of this his petition filed in pursuance of Section 1142 of the Internal Revenue Code for the review of the order and decision, hereinafter described, of the United States Board of Tax Appeals rendered on May 31, 1940, respectfully shows to this Honorable Court as follows:

I. STATEMENT OF THE NATURE OF THE CONTROVERSY.

1. On August 25, 1938, the Commissioner of Internal Revenue, the Respondent herein, mailed to Annie L. Flagler,

82 *Petition for Review of Decision of the United States Board of Tax Appeals*

now deceased, by registered mail a notice of the determination of an asserted deficiency in income tax for the calendar year 1936 in the amount of $8,468.84. On November 23, 1938, Annie L. Flagler duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the redetermination of $6,262.66 of said asserted deficiency. The remainder of said asserted deficiency, being $2,206.18, is not in dispute.

2. Said $6,262.66 of income tax claimed by the Respond-
83 ent to be due from Annie L. Flagler resulted from the use by the Respondent, in computing basis and gain on the sale by Annie L. Flagler in 1936 of certain stock, of the fair market value as of May 20, 1913, of certain predecessor stock.

3. On May 20, 1913, one Henry M. Flagler (hereinafter called the Testator), a resident of St. Johns County, Florida, died testate, leaving a last will and testament dated February 1, 1902, with seven codicils thereto. By said will, a trust was created to continue for a term of five years from the time of the death of the Testator and for an additional term
84 not exceeding five years if the Testator's Florida properties should be in such a condition as "to require financial aid from someone outside of themselves * * *." Pursuant to this provision, this trust did continue for the full additional term and terminated on May 20, 1923.

4. By the terms of said Last Will and Testament and of the Codicils thereto, Harry Harkness Flagler, husband of Annie L. Flagler, became entitled to receive and by the act of the Trustees under said Will and Codicils did receive from said Trustees on April 26, 1921, 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited.

Petition for Review of Decision of the United States Board of Tax Appeals

5. Said 10,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, received by Harry Harkness Flagler from said Trustees, were a part of 15,000 ordinary shares of said stock which had been acquired by said Trustees as follows:

a. Five thousand of said shares were received, with others, by said Trustees from the Estate of the Testator as of the date of his death, namely, May 20, 1913.

b. On November 26, 1913, after said Estate was in the hands of said Trustees, a 100% stock dividend was declared by Anglo-American Oil Company, Limited, Said Trustees accordingly received as a stock dividend on December 3, 1913, 5,000 additional ordinary shares of said stock.

c. In February, 1918, the shareholders of Anglo-American Oil Company, Limited, were given rights to subscribe for additional ordinary shares of said stock. In the exercise of said rights 5,000 shares were subscribed for by said Trustees at a cost of $7.50 per share. Those 5,000 shares were received by said Trustees on May 1, 1918.

6. After a stock dividend in 1925 of 3,333 ordinary shares of the stock of Anglo-American Oil Company, Limited, in respect of said 10,000 ordinary shares, said 13,333 ordinary shares in a tax-free reorganization in 1930 were exchanged for 2,400 shares of the preferred stock of Standard Oil Export Corporation.

7. On or about April 14, 1932, said Harry Harkness Flagler made a gift to his wife, Annie L. Flagler, now deceased, of 704 of said 2,400 shares of the preferred stock of Standard Oil Export Corporation.

8. In May, 1936, Annie L. Flagler sold said 704 shares of the preferred stock of Standard Oil Export Corporation.

88 *Petition for Review of Decision of the United States Board of Tax Appeals*

9. Annie L. Flagler contended in her appeal before the Board that the basis for the computation of gain or loss under Sections 113(a)(2) and 113(a)(5) of the Revenue Act of 1936 on the sale of the Standard Oil Export Corporation preferred stock sold by her in 1936 was the fair market value of the predecessor stock on April 26, 1921, the date when Harry Harkness Flagler first obtained possession, control, enjoyment, and substantial ownership of said predecessor stock.

89 10. The Respondent contended that the basis of said Standard Oil Export Corporation preferred stock was the fair market value of the predecessor stock on May 20, 1913, the date of death of the Testator.

11. On May 31, 1940, the Board promulgated its memorandum findings of fact and opinion wherein it decided in accordance with the contention of the Respondent that the basis for the computation of gain was the fair market value on the date of death of the Testator.

12. On May 31, 1940, the Board rendered, and entered in its records, an order and decision in accordance with its
90 said opinion whereby it ordered and decided that there is a deficiency in income tax of the Petitioner for the year 1936 in the amount of $8,468.84.

II. Declaration of the Court in Which the Review is Sought.

The Petitioner, feeling aggrieved by said order and decision, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in which Circuit is located the office of the Collector of Internal Revenue to which was made the return in respect of which the liability involved in the appeal arises.

Petition for Review of Decision of the United States Board of Tax Appeals

III. Assignments of Errors.

The Petitioner as a basis for the review of said order and decision makes the following assignments of errors:

1. The Board erred in that it decided and held that in determining the basis of Annie L. Flagler for the computation of gain on the sale in 1936 of the preferred stock of Standard Oil Export Corporation there should be used the fair market value of the predecessor stock on the date of death of said Henry M. Flagler under the will of whom Harry Harkness Flagler acquired the predecessor stock.

2. The Board erred in that it did not decide and hold that the basis of Annie L. Flagler for the computation of gain on the sale in 1936 of the preferred stock of Standard Oil Export Corporation was the fair market value of the predecessor stock on the date when Harry Harkness Flagler received said predecessor stock from the testamentary trustees under the will of said Henry M. Flagler.

3. The Board erred in that it did not decide and hold that under Sections 113(a)(2) and 113(a)(5) of the Revenue Act of 1936 the basis for the computation of gain upon the sale in 1936 by Annie L. Flagler of 704 shares of preferred stock of Standard Oil Export Corporation is the fair market value on April 26, 1921, of its predecessor stock, which was transferred on that date to Harry Harkness Flagler by said testamentary trustees.

4. The Board erred in that it decided and held that in determining the basis of said 704 shares of preferred stock of Standard Oil Export Corporation sold in 1936 there should be used the fair market value of the predecessor stock on May 20, 1913, the date of death of said Henry M. Flagler.

94 *Petition for Review of Decision of the United States Board of Tax Appeals*

5. The Board erred in that it did not decide and hold that under Section 113(a)(5) of the Revenue Act of 1936 the "time of * * * acquisition" of the property involved in this proceeding and acquired by Harry Harkness Flagler by bequest is the date upon which he obtained possession, enjoyment, control, and substantial ownership of such property.

6. The Board erred in that it decided and held that under Section 113(a)(5) of the Revenue Act of 1936 the
95 "time of * * * acquisition" of the property involved in this proceeding was May 20, 1913.

7. The Board erred in that it decided that "time of such acquisition," as used in Section 113(a)(5) of the Revenue Act of 1936, means the date of death of the decedent as to all property acquired from the decedent "by bequest, devise or inheritance," regardless of whether title to the property thus acquired as of the date of death of decedent was contingent or vested.

8. The Board erred in that it did not decide and hold
96 that Harry Harkness Flagler first acquired possession, enjoyment, control, and substantial ownership of the property involved in this proceeding on April 26, 1921, date of the transfer to him by the testamentary trustees.

9. The Board erred in that it did not decide and hold that the bequest to Harry Harkness Flagler was contingent and did not vest in him until the predecessor stock was distributed to him by said testamentary trustees.

10. The Board erred in that it did not decide and hold that there was no deficiency due by the Petitioner in respect to the income tax of Annie L. Flagler, deceased, for the cal-

endar year 1936 other than the deficiency of $2,206.18 which is not in controversy.

11. The Board erred in that it decided and held in this proceeding that there was a deficiency in income tax for the calendar year 1936 in the amount of $8,468.84.

12. The Board erred in deciding and holding contrary to the law.

13. The Board erred in deciding and holding contrary to the evidence.

WHEREFORE, your Petitioner prays that said decision and order of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

HARRY HARKNESS FLAGLER, EXECUTOR OF THE ESTATE OF ANNIE L. FLAGLER, DECEASED,

Petitioner,

By JOSEPH C. WHITE
JOSEPH C. WHITE
Attorney of Record for Petitioner

100 *Petition for Review of Decision of the United States Board of Tax Appeals*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH C. WHITE, being first duly sworn, deposes and says that he is the attorney of record for Harry Harkness Flagler, Executor of the Estate of Annie L. Flagler, Deceased, the petitioner herein, and as such is duly authorized to verify the above petition for review; that he has read said petition; that the facts therein set forth are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

101

JOSEPH C. WHITE

Subscribed and sworn to before
me this 23rd day of August, 1940.

JOHN C. BARNWELL

JOHN C. BARNWELL
Notary Public, Bronx County
Bronx Co. Clk's No. 266, Reg. No. 279B41
Certificates Filed in
102 N. Y. Co. Clk's No. 1467 Reg. No. 1B370
Kings Co. Clk's No. 137 Reg. No. 1536
Commission Expires March 30, 1941

[NOTARIAL SEAL]

Notice of Filing Petition for Review

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B. T. A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased,

HARRY HARKNESS FLAGLER, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To:

GUY T. HELVERING, ESQ.,
Commissioner of Internal Revenue,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, Harry Harkness Flagler, Executor of the Estate of Annie L. Flagler, deceased, the petitioner in the above-entitled proceeding, filed with the Clerk of the United States Board of Tax Appeals the petition of said petitioner, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Second Circuit of the order and decision of said Board rendered and entered in its records in the above-entitled proceeding on May 31, 1940.

New York, N. Y., August 27, 1940.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL
JOHN P. WENCHEL,
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent.

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Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from August , 1940, the date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been so filed was served upon the respondent in said proceeding, transmit and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The docket entries of the proceedings before the Board in the above-entitled proceeding;

2. The petition, together with exhibit thereto, in said proceeding for redetermination of the deficiency of income tax;

3. The answer of the respondent in said proceeding;

112 *Praecipe for Record*

4. The stipulation of facts and exhibit thereto introduced at the hearing;

5. The order substituting Harry Harkness Flagler, Executor of the Estate of Annie L. Flagler, deceased, as petitioner in said proceeding.

6. The memorandum findings of fact and opinion entered May 31, 1940;

7. The order and decision of the Board entered in its records May 31, 1940;

113 8. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit;

9. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding;

10. Stipulation and Order in lieu of printing Exhibit A to Stipulation of Facts;

11. This praecipe for record;

12. The notice of the filing of this praecipe for the record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding.

114

JOSEPH C. WHITE
Joseph C. White
Attorney for Petitioner.

New York, N. Y.,
August , 1940.

Notice of Filing of Praecipe for Record

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:
JOHN P. WENCHEL, ESQ.,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for the Respondent,
Washington, D. C.

Sir:

PLEASE TAKE NOTICE that on the 27th day of August, 1940, the undersigned attorney for the petitioner in the above-entitled proceeding has filed with the Clerk of the United States Board of Tax Appeals the praecipe for record, of which a copy is annexed hereto.

JOSEPH C. WHITE,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

New York, N. Y.,
August 27, 1940.

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ADMISSION OF SERVICE

Receipt of the foregoing notice of filing of the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 27th day of August, 1940.

J. P. WENCHEL

JOHN P. WENCHEL,
Chief Counsel for the Bureau
of Internal Revenue,
Attorney for the Respondent.

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120

Clerk's Certificate

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UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, 122
Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 110, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of 123
Sept., 1940.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[SEAL]

124 **Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B.T.A. Docket No. 96066

MARY FLAGLER CARY,

Petitioner,

125 *against*

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

B.T.A. Docket No. 96235

HARRY HARKNESS FLAGLER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent;

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B.T.A. Docket No. 96236

ESTATE OF ANNIE L. FLAGLER, Deceased, HARRY HARKNESS FLAGLER, Executor,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts 127

B.T.A. Docket No. 96237

JEAN LOUISE MATTHEWS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER 128

IT IS HEREBY STIPULATED AND AGREED by and between the above-named petitioners, by their attorney of record, Joseph C. White, and the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General of the United States, as follows:

The above four cases involve an identical question of law and were consolidated for purposes of the Brief and Argument before the United States Board of Tax Appeals.

Separate stipulations of facts and separate records were made in the United States Board of Tax Appeals in each of the above four cases. A part of the stipulation of facts in 129
each of the above four cases was an exhibit consisting of a certified copy of the Last Will and Testament, with codicils thereto, of Henry M. Flagler. This exhibit is sixty-five mimeographed pages long and the parties hereto agree, in order to avoid unnecessary printing expense, that this exhibit, a part of the stipulation of facts in each of the above four cases before the United States Board of Tax Appeals, may be printed only once, to wit, in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue,* which case has the lowest Docket Number in the United States Board of Tax Appeals, when the cases come on for

130 *Stipulation and Order In Lieu of Printing Exhibit A to Stipulation of Facts*

appeal before the United States Circuit Court of Appeals for the Second Circuit. In lieu of the printing of the above-mentioned exhibit in the other three records a copy of this Stipulation and Order will be printed in those records and cross references made to the exhibit printed in the record of the case of *Mary Flagler Cary* v. *Commissioner of Internal Revenue.*

IT IS FURTHER AGREED by and between the parties hereto that the above four cases may be consolidated for purposes
131 of the Brief in the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH C. WHITE
Joseph C. White,
Attorney for Petitioners.

SAMUEL O. CLARK, JR.
Samuel O. Clark, Jr.,
Assistant Attorney General of the United States

So ordered:

132 Dated October 24, 1940.

THOMAS W. SWAN
U. S. C. J.

[fol. 45] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

(Argued January 8, 1941. Decided January 17, 1941)

Nos. 145-6-7-8

MARY FLAGLER CARY, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

[fol. 46] JEAN LOUISE MATTHEWS, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On appeal from four orders of the Board of Tax Appeals fixing deficiencies in income taxes for the years 1934 and 1936

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Roswell L. Gilpatric for the Petitioners.
Helen R. Carloss for the Respondent.

Per CURIAM:

Orders affirmed on the authority of Van Vranken v. Helvering, 115 Fed. (2) 709 (C. C. A. 2).

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

HARRY HARKNESS FLAGLER, Executor of Annie L. Flagler, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 48] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry Harkness Flagler, Executor of Annie L. Flagler, v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 22, 1941. D. E. Roberts, Clerk.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 684, 734, and 735.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 737

JEAN LOUISE MATTHEWS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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Docket Entries

1

DOCKET NO. 96237

MRS. JEAN LOUISE MATTHEWS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:

2

For Petitioner: Joseph C. White, Esq., Richard H. Wilmer, esq.

For Respondent: John R. Wheeler, Esq.

DOCKET ENTRIES:

1938

Nov. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 23—Copy of petition served on General Counsel.

1939

3

Jan. 17—Answer filed by General Counsel.

Jan. 17—Request for Circuit hearing in New York City filed by General Counsel.

Jan. 20—Notice issued placing proceeding on New York City Calendar. Copy of answer and request served.

Sept. 19—Hearing set Nov. 13, 1939, New York, N. Y.

Nov. 14—Hearing had before Mr. Murdock, on the merits. Submitted. Consolidated with 96066, 96235-36. Stipulation of facts filed. Briefs due in 60 days —replies due in 15 days.

4 *Docket Entries*

1940

Jan. 12—Motion for extension to Jan. 28, 1940 to file brief filed by General Counsel.

Jan. 16—Notice of appearance of Richard H. Wilmer as counsel filed.

Jan. 16—Motion for leave to file attached printed brief filed by taxpayer. 1/18/40 granted.

Jan. 18—Brief filed by taxpayer.

Jan. 23—Motion for leave to file brief filed by General Counsel—brief lodged. 1/24/40 granted.

5

Jan. 24—Copy of brief served on General Counsel.

Feb. 1—Memorandum reply brief filed by General Counsel.

Feb. 6—Reply brief filed by taxpayer. 2/6/40 copy served.

May 31—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for respondent.

May 31—Decision entered—J. E. Murdock, Division 3.

Aug. 27—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

6

Aug. 27—Proof of service filed by taxpayer.

Aug. 27—Praecipe filed by taxpayer.

Aug. 27—Proof of service filed by taxpayer.

Petition

UNITED STATES BOARD OF TAX APPEALS

Docket No. 96237

MRS. JEAN LOUISE MATTHEWS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1-JMF:90D) dated August 25, 1938, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with residence at 2801 Pine Tree Drive, Miami Beach, Florida. The return for the period here involved was filed with the Collector for the Fourteenth District of New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 25, 1938. Also attached hereto and marked Exhibit B is Schedule I-A of the report of examination dated March 29, 1938, referred to in the statement attached to said notice of deficiency.

3. The taxes in controversy are income taxes for the calendar year 1934 and in the amount of $9,604.99.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

10 *Petition*

(1) Substitution of the basis of $68,630.89 in lieu of a basis of $122,943.62 in the computation of a profit on the sale of the 1,919 shares of the preferred stock of Standard Oil Export Corporation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On May 20, 1913, one Henry M. Flagler, a resident of St. Johns County, Florida, died testate leaving a last will and testament dated February 1, 1902 and seven codicils
11 dated respectively February 17, 1903; April 28, 1904; January 8, 1906; April 7, 1908; December 22, 1910; January 10, 1912; and September 13, 1912; which said last will and testament and codicils thereto were duly admitted to probate in Court of County Judge in and for St. Johns County, Florida, on May 24, 1913.

(b) Item Third of said last will and testament provided as follows:

"I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and
12 properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated, except what is covered by the 'Fourth' Item of this instrument, and may be necessary for the expense of administration by my executors, including court costs, to my Trustees above named, which trust shall be and continue for the length of time hereinafter by this instrument provided."

(c) Said last will and testament after providing in Item Fourth for certain relatively small bequests provided in Item Fifth thereof as follows:

> "The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida Properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida Railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. It is, however, to be distinctly understood that I do not authorize the railroad of said Railway Company extended south of Miami and no power to do so is given hereby."

(d) Item Sixth of said last will and testament provided in part as follows:

> "During the existence of said trust I charge said trust estate with the payment of the following annuities and expenses and direct that the same be paid by the Trustees:
>
> "1. To my dearly beloved wife, Mary Lilly Flagler, the annual sum of One Hundred Thousand Dollars

16 *Petition*

($100,000) payable in quarterly installments from the date of my decease; and I further direct that so much of the annual net income from said trust property over and above the said annuity and that hereinafter by subsequent clause of this item provided for, as shall not be required during the extended or second period of said trust, provided for in the 'Fifth' Item of this instrument shall be paid to my said wife annually."

(e) Item Seventh of said last will and testament provided in part as follows:

17 "in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock."

18 (f) The petitioner herein is one of the children referred to in the foregoing quotation from Item Seventh of said last will and testament and was born prior to May 20, 1913.

(g) Item Ninth of said last will and testament provided as follows:

"All the rest, residue, and remainder of my estate whether real or personal and wheresoever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise

and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the City of New York, state and county of New York."

(h) Item Tenth of said last will and testament provided in part as follows:

"For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

* * * * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the

various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company."

(i) Item Third of the codicil of said Henry M. Flagler dated January 8, 1906, provided in part as follows:

"I wish to, and do hereby amend the 'Tenth' Item of my said original will by adding at the end of the first paragraph thereof the following, to wit:

"In view of the Florida East Coast Railway Company having determined to extend and being now engaged in extending its railway to the City of Key West, I hereby authorize said trustees to borrow from time to time money in such sums and upon such terms as they may find necessary and deem proper to enable said Florida East Coast Railway Company to make such extension including also the purchase and construction of terminal facilities and rolling stock and other equipment, and every proper purpose incidental to such enterprise, and to pledge so much of the trust properties as may be necessary for the payment of such loans, and to lend on such terms as they may deem proper, such money to said Florida East Coast Railway Company to be used by it for such purposes."

(j) Item First of the Codicil of said Henry M. Flagler, dated September 13, 1912, provided as follows:

"Whereas in my said last will and testament, I have bequeathed to my son, and to his children, in the manner described and provided for in my said

last will and testament, certain shares of Standard Oil stocks, therein more particularly designated and described, and whereas since the time of the making, publishing and declaring of my said last will and testament, certain changes in the form of said shares and the rights thereunder have taken place, by reason of which some uncertainty might arise as to my intentions in relation to the said bequests.

"Now to obviate any uncertainty relating thereto, I do hereby declare it to have been, and still to be my intention to include by the terms of shares of Standard Oil stocks, in my said last will and testament the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for."

(k) Pursuant to the provisions of Item Fifth of said last will and testament said trustees elected to continue said trust beyond the end of five years from the time of the death of said Henry M. Flagler and said trust did continue for a period of ten years from the time of the death of said Henry M. Flagler and terminated on May 20, 1923.

(l) Said trustees delivered, assigned and transferred to the petitioner subsequent to May 20, 1923, but as of that date, 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited. In 1925 the petitioner received a stock dividend of 2,666 ordinary shares of the stock of Anglo-American Oil Company, Limited in respect of said 8,000 shares of said stock, giving her an aggregate of 10,666 shares of said stock. On January 31, 1930, said 10,666 shares were exchanged for 1,919.88 shares of the preferred stock of Standard Oil Export Corporation. In 1930 the petitioner

28 *Petition*

sold the 88/100 share and in her income tax return for that year ascribed a tax basis thereto of $56.38.

(m) By a trust agreement dated July 2, 1931, the petitioner granted, assigned, set over, and delivered to Harry Harkness Flagler as trustee in trust certain securities including the 1,919 shares of the preferred stock of Standard Oil Export Corporation hereinbefore referred to.

(n) The fair market value of said 8,000 ordinary shares of the stock of Anglo-American Oil Company, Limited, on
29 May 20, 1923, was $123,000. The fair market value of said 1,919.88 shares of the preferred stock of Standard Oil Export Corporation on January 31, 1930, was $186,228.36.

(o) The tax basis of said 1,919 shares of preferred stock of Standard Oil Export Corporation in December, 1934, was not less than $122,943.62.

(p) In December, 1934, said Harry Harkness Flagler as trustee sold said 1,919 shares of the preferred stock of Standard Oil Export Corporation for which he received as such trustee the net amount of $212,110.60.

30 WHEREFORE, the petitioner prays that this Board may hear the proceeding, redetermine the deficiency alleged in said notice of deficiency, determine that the petitioner has made an overpayment of tax in respect of the taxable year herein involved, and grant such other and further relief as the Board shall deem proper.

Joseph C. White
JOSEPH C. WHITE,
15 Broad Street,
New York, N. Y.
Counsel for Petitioner

Petition

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JEAN LOUISE MATTHEWS being duly sworn deposes and says:

That she is the petitioner above named; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein; and that the statements contained therein are true except those stated to be on information and belief and that those she believes to be true.

JEAN LOUISE MATTHEWS.

Subscribed and sworn to before me
this 21st day of November, 1938.

ALFRED SHELDRICK
Notary Public, Kings County
Kings Co. Clerk's No. 436, Reg. No. 577
N. Y. Co. Clerk's No. 1134, Reg. No. O 8734
Bronx Co. Clerk's No. 49, Reg. No. 242 S40
Queens Co. Clerk's No. 571, Reg. No. 2571
Certificates filed also in
Richmond and Westchester Counties
Commission expires March 30, 1940

[NOTARIAL SEAL]

34 EXHIBIT A

Letterhead of
TREASURY DEPARTMENT

August 25, 1938

Mrs. Jean Louise Matthews,
32 Park Avenue,
New York, New York.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934, discloses a deficiency of $9,604.99 as shown in the statement attached.

35

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

36

Respectfully,

GUY T. HELVERING,
Commissioner,
By W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures:
Statement
Form of waiver

37

STATEMENT

IT:A:1
JMF:90D

MRS. JEAN LOUISE MATTHEWS,
32 Park Avenue,
New York, New York.

TAX LIABILITY FOR TAXABLE YEAR ENDED DECEMBER 31, 1934

	Liability	Assessed	Deficiency
Income Tax.....	$144,807.28	$135,202.29	$9,604.99

38

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 29, 1938; to your protest dated March 2, 1938 and to the statements made at the conference held on June 24, 1938.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	$274,037.32
Unallowable deductions and additional income:	
(a) Fiduciary	27,915.08
(b) Capital gain	16,293.82
Net income adjusted	$318,246.22

39

EXPLANATION OF ADJUSTMENTS

(a) This adjustment was made in a previous examination to which you consented in a signed agreement and the resulting deficiency in tax has been assessed.

280 U. S. 327 (1930). The analogous section in the Revenue Acts of 1928 and 1932 was somewhat different. In other words, Congress, in the Revenue Act of 1934, went back to the language used in the Acts prior to that of 1928 and reenacted that language.

In 1920 the Bureau of Internal Revenue issued a ruling under the Revenue Act of 1918 to the effect that where a remainderman has only a contingent interest in property prior to the death of the life tenant, the remainderman acquires the property only upon the death of the life tenant. O. D. 727, 3 C. B. 53. Twelve years later, in 1932, the General Counsel for the Bureau of Internal Revenue reaffirmed the position in G. C. M. 10260, XI-1 C. B. 79, saying at p. 80:

> "the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested."

In at least three cases decided before the enactment of the Revenue Act of 1934 the courts had uniformly reached the same conclusion. *Pringle* v. *Commissioner,* 64 F. (2d) 863 (C. C. A. 9th, 1933), *cert. den.,* 290 U. S. 656 (1933), decided under the Revenue Act of 1921; *Lane* v. *Corwin,* 63 F. (2d) 767 (C. C. A. 2d, 1933), *cert. den.,* 290 U. S. 644 (1933), decided under the Revenue Act of 1928; *Anchor Realty & Investment Co.* v. *Becker,* 3 F. Supp. 22 (E. D. Mo., 1933), aff'd, 71 F. (2d) 355 (C. C. A. 8th, 1934), decided under the Revenue Act of 1928. Although there have been numerous cases decided after the enactment of the Revenue Act of 1934 your Petitioners have found no decision holding contrary to the above except

those of the Second Circuit in the *Van Vranken* and the instant cases.

In three cases decided by this Court on December 9, 1940, involving the identical problem of statutory construction it was held that the Commissioner's regulations attempting to change the well established meaning of statutory language that had been defined only by administrative rulings were invalid for the reason that the changes could be made only by Congress. *Helvering* v. *Janney, Taft* v. *Helvering,* and *Helvering* v. *Oregon Mutual Life Insurance Co.* (61 S. Ct. 241, 244 and 207).

For instance, in *Helvering* v. *Janney,* in holding the regulations invalid this Court said:

> "It was not until 1935 that the Treasury Department by Article 117-5 of Regulations 86 undertook to provide that 'the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets'.
>
> "We are of the opinion that under the provision of the Act of 1934 as to joint returns of husband and wife, which embodied a policy set forth in substantially the same terms for many years, Congress intended to provide for a tax on the aggregate net income and that the losses of one spouse might be deducted from the gains of the other; and that this applied as well to deductions for capital losses as to other deductions. This, we think, was the meaning of the provision of the Revenue Act of 1934 when it was enacted, and it was subject to change only by Congress, and not by the Department."

In *Taft* v. *Helvering* this Court concluded as follows:

> "In 1935, by Article 23(o)-1 of Treasury Regulations 86, the Department sought to require a husband and wife, whether they make 'a joint return or separate returns', to base their deduction for charitable contributions on the separate net income of the spouse making them. We are of the opinion that under the Revenue Act of 1934, taken with the meaning we think it had when enacted, petitioners were entitled to the combined deductions they claimed, and that the departmental regulation to the contrary was ineffective to deprive them of that right."

Finally, in *Helvering* v. *Oregon Mutual Life Insurance Co.*, this Court said:

> "We find it unnecessary to discuss the extent to which such a regulation might, under different circumstances, be given retroactive effect by virtue of the statutory power of the Commissioner. Nor do we find it necessary to discuss the argument that the policy behind the special treatment afforded life insurance companies does not warrant allowing this deduction. For it is our conclusion that by section 203(a)(2) of the 1932 and 1934 Acts, Congress has granted life insurance companies a deduction for disability reserves which only Congress can take away."

The Commissioner's regulations involved in the instant cases are therefore invalid if the intention of Congress was, as the *Reynolds* case holds, to adopt the uniform administrative and judicial construction of § 113(a)(5) upon the reenactment of that Section in the Revenue Act of 1934. Under the most recent rulings of this Court it is for

Congress, and Congress alone, to change the meaning thus given the statutory language when originally enacted.

We, therefore, respectfully urge that this Court allow the writ.

Respectfully submitted,

ROSWELL L. GILPATRIC,
JOSEPH C. WHITE,
Attorneys for Petitioners.

MAURICE T. MOORE,
H. BRICE GRAVES,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1940

No. 734

MARY FLAGLER CARY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 735

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 737

JEAN LOUISE MATTHEWS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR THE PETITIONERS

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Supreme Court of the United States

OCTOBER TERM 1940

MARY FLAGLER CARY, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 734
HARRY HARKNESS FLAGLER, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 735
ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, Executor, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 736
JEAN LOUISE MATTHEWS, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 737

BRIEF FOR THE PETITIONERS

All references to the Record in these cases will be to the Record in the case of *Mary Flagler Cary* v. *Commissioner,* No. 734, unless otherwise specified.

OPINIONS BELOW

The opinions of the Board of Tax Appeals (No. 734, R. 75; No. 735 R. 27; No. 736, R. 25; No. 737, R. 25) are unreported.

The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit, 116 F. (2d) 800, was rendered January 17, 1941, and appears at R. 93.

JURISDICTION

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347(a)), and § 1141(a) of the Internal Revenue Code. The decrees of the Circuit Court of Appeals for the Second Circuit were entered on January 22, 1941 (No. 734, R. 94; No. 735, R. 48; No. 736, R. 46; No. 737, R. 45). A consolidated petition for certiorari was filed January 30, 1941, and was granted March 10, 1941 (No. 734, R. 95; No. 735, R. 49; No. 736, R. 47; No. 737, R. 46).

THE ISSUE INVOLVED

These cases involve the meaning of the phrase "fair market value of property at the time of acquisition" in a situation where legatees first acquired substantial ownership of such property upon the termination of a trust ten years after the death of the testator. The cases arose under § 113(a)(5) of the Revenue Acts of 1934 and 1936.

STATUTES INVOLVED

The statute directly involved in these cases is § 113(a)(5) of the Revenue Acts of 1934 and 1936, which is the same in both Acts. It reads as follows:

> "If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the

decedent, the basis shall be the fair market value of such property at the time of such acquisition."

Provisions of earlier Acts and Bills which are material in establishing the proper construction of this section are set out in the Brief where relevant and are gathered together in the Appendix.

STATEMENT OF FACTS

The facts in these cases were stipulated (No. 734, R. 17-74; No. 735, R. 21-26; No. 736, R. 19-23; No. 737, R. 20-24), and the Board of Tax Appeals found the facts as stipulated (No. 734, R. 75; No. 735, R. 27; No. 736, R. 25; No. 737, R. 25). The facts may be summarized as follows:

During 1934 and 1936 the Petitioners sold various shares of stock of Standard Oil Export Corporation. In order to state clearly the facts in these cases it is necessary first to trace the history and origin of that stock.

In *The Standard Oil Company of New Jersey* v. *The United States,* 221 U. S. 1, this Court affirmed with modifications a decree providing for the disintegration of Standard Oil Company of New Jersey. In about the year 1911 the stockholders of Standard Oil Company of New Jersey received in connection with the disintegration of that company, among other things, one ordinary share of the stock of Anglo-American Oil Company, Limited, for each share held of the stock of Standard Oil Company of New Jersey (R. 19). Between 1913 and 1925 Anglo-American Oil Company, Limited, issued various stock dividends and rights (R. 20) with the result that one share of Standard

Oil Company of New Jersey held in 1911 was by the end of 1925 represented in part by four shares of Anglo-American Oil Company, Limited. In 1930 the shares of Anglo-American Oil Company, Limited, were exchanged in a tax-free reorganization for preferred stock of Standard Oil Export Corporation (R. 20) which is the stock the sale of which gave rise to the income involved in these cases.

The parties and the Court and Board below have not attached any tax significance to the corporate changes traced in the preceding paragraph. A knowledge of the changes is necessary, however, because the Petitioners who in 1934 and 1936 sold the Standard Oil Export stock had received[1] in 1923[2] stock of Anglo-American Oil Company, Limited, from testamentary trustees under the will of Henry M. Flagler dated February 1, 1902 which speaks in terms of stock of Standard Oil Company of New Jersey.

Said Henry M. Flagler (hereinafter called the Testator) had died on May 20, 1913, a resident of the State of Florida (R. 18), leaving a last will and testament dated February 1, 1902, and seven codicils dated from February 17, 1903, to September 13, 1912. Substantially all the Testator's property, including the stock of Anglo-American Oil Company, Limited, referred to above, had been

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[1]Except Annie L. Flagler, whose estate is the Petitioner in No. 736. She received the stock involved in this case as a gift from her husband, Petitioner in No. 735, in 1932 (No. 736, R. 22). Harry Harkness Flagler, however, received this stock as indicated above and therefore the situation is the same as to both of these parties.

[2]Except, in so far as property in these cases is involved, as to 10,000 shares of the stock of Anglo-American Oil Company, Limited, distributed to Harry Harkness Flagler, Petitioner in No. 735, on April 26, 1921 (No. 735, R. 24). See also Note 1, above.

left by him under his will to trustees for the purpose stated in Item Third of his will, as follows:

> "THIRD: I have been for many years investing in railroads, hotel and land companies in the state of Florida, and it is my intention in the future to foster, protect and properly develop such properties, and to provide against my decease while such properties are in the processes of development and to relieve my beloved wife, hereinafter named, from the immediate cares and responsibilities of so varied and such extensive interests, I hereby declare a trust concerning all my property, both real and personal, and wheresoever situated * * *." (R. 23.)

The trust was to continue for a term of five years from the time of the death of the Testator, and for an additional term not exceeding five years if the Testator's Florida properties should be in such condition as "to require financial aid from sources outside of themselves * * *." (R. 25.) Thus, Item Fifth of said last will and testament provided as follows:

> "FIFTH: The balance of my estate I place, according to the purpose declared in the 'Third' Item of this instrument, in the hands of my said Trustees, to be used, managed and controlled by them and their successors for the purpose of protecting, fostering, operating and developing during the life of such trust, all my Florida properties according to the purposes indicated by the charters of the several companies, and as nearly along the lines which I have adopted, or may hereafter adopt, as may be consistent with their judgment, and discretion under the conditions which may hereafter exist. The said trust shall continue for five years from the time of

> my death, and if at the end of such five years the condition of the Florida East Coast Railway Company and the Florida East Coast Hotel Company (they being my Florida railroad and hotel properties referred to) or of either of them should be such as to require financial aid from sources outside of themselves or itself, then I direct that such trust shall continue so long as either or both of such last named companies shall require such assistance, but not longer, however, than a period of five years from the termination of the above mentioned or first period of five years. * * *" (R. 24, 25.)

The trust did, in fact, continue for a period of ten years from the time of the death of the Testator and terminated on May 20, 1923 (R. 19).

The Testator provided in Item Sixth of his said last will and testament that from and after his death the annual sum of $100,000 should be paid his wife, Mary Lily Flagler, and the trustees were directed to pay to said Mary Lily Flagler, in addition, so much of the annual net income from the trust property as should not be required for trust purposes during any extended period of the trust beyond the original five years (R. 25).

The trustees of the trust created by the Testator's last will and testament were given broad powers over the trust property. Item Tenth of said last will and testament provided in part as follows:

> "TENTH: For the purpose of the fulfillment and due execution of the above trust I hereby invest my Trustees with full power and authority to execute all such instruments, obligations, assignments or transfers as may be necessary in the course of their business as such Trustees and to renew, refund, and

by new obligation to provide for the extension, adjustment and payment of any and all obligations that I may leave outstanding at the time of my decease, to the end that if possible all and any such obligations shall be paid and discharged out of the income of my estate during the continuance of such trust.

* * * * * *

"It is my will and intention, in so far as I am legally able to do so to exempt my Trustees in the matter of investment and reinvestment of any portion of my estate from the limitations as to the classes of securities that may be named in the provisions of the statutes of the state of Florida or of any other state or of the United States in respect to the investment of the proceeds and income of trust estate; the principal object of this exemption being that if any of the various enterprises, companies or corporations referred to above in which I am interested shall require temporary assistance the provisions of such statutes shall not interfere to prevent any loan to or on account of such companies or corporations as in the absence of such statutory restrictions might seem wise or advisable on the part of my said Trustees; it is, however, not my intention that any such assistance shall be extended to any other than the following companies:

"The Florida East Coast Railway Company, and the Florida East Coast Hotel Company." (R. 28, 29.)

The Testator made his wife, Mary Lily Flagler, the residuary legatee of his estate. Thus it was provided in Item Ninth of said last will and testament as follows:

"NINTH: All the rest, residue, and remainder of my estate whether real or personal and whereso-

> ever situate, including of course all property covered by or included in said trust and not payable out of the same or at the end of said trust and all other property and estate of any and every kind whatsoever, I give, devise and bequeath to my beloved wife, Mary Lily Flagler (formerly Mary Lily Kenan of Wilmington, North Carolina) forever, and I hereby authorize, empower, and direct my said executors and Trustees to pay over and transfer to my said wife at the expiration of said trust all such estate and property. And it is my intention to include in this gift, bequest and devise all accumulations or enlargements of my estate and property as shall have arisen during the life and operation of said trust; and it is also my intention to include in such devise my summer home at Mamaroneck, in the County of Westchester, state of New York, and my property, Number Twenty-one West Fifty-fifth Street in the city of New York, state and county of New York." (R. 28.)

The Testator also provided by Item Fifth of the codicil of April 28, 1904, that nine individuals named therein or their heirs should constitute his residuary legatees in case his wife, Mary Lily Flagler, should predecease him and he should leave no children surviving him except his son Harry Harkness Flagler (R. 36).

Item Seventh of said last will and testament provided in part as follows:

> "SEVENTH: At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to

> my said son. And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock. * * *" (R. 25, 26.)

Harry Harkness Flagler, Petitioner in No. 735, was the only son of the Testator (No. 735, R. 22). Petitioners in Nos. 734 and 737 are two of the three children of Harry Harkness Flagler (No. 734, R. 19; No. 737, R. 21). Annie L. Flagler was the wife of Harry Harkness Flagler (No. 736, R. 22).

By Item Second of the codicil of April 28, 1904, it was provided as follows:

> "SECOND: I wish further to say, in explanation of the provision made in Item numbered 'Seventh' of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time of my death or at the time of the expiration of the trust therein referred to, such expression 'expiration of said trust' to be understood as explained in the Item numbered 'First' of this codicil, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate." (R. 34, 35.)

By Item First of the codicil of September 13, 1912, it was provided in part as follows:

> "* * * I do hereby declare it to have been, and still to be my intention to include by the term of shares of Standard Oil stocks, in my said last will and testament, the said shares, or such other shares of stock, property and rights as have been, or may hereafter be issued to or received in the place and stead of said shares of Standard Oil stocks as the same existed at the time of the making of my last will and testament, excepting therefrom, however, such subscription rights under said stock or arising from the ownership thereof, as I have heretofore or may hereafter exercise and pay for." (R. 45.)

By Item Second of the codicil of September 13, 1912, it was provided as follows:

> "Second. It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate." (R. 45.)

Upon the termination of the trust the trustees delivered, assigned, and transferred to the Petitioners the appropriate amounts of stock of Anglo-American Oil Company, Limited, which, as explained above, were represented in 1934 and 1936 by the stock then sold by the Petitioners.

Purporting to apply § 113(a)(5) of the Revenue Acts of 1934 and 1936 and disregarding the intervening trust in which had been vested complete dominion over the property in question and over the income therefrom the Board determined that the property in question had been "acquired" by the Petitioners upon the death of the Testator

in 1913 and accordingly entered its orders to the effect that the tax basis of the Anglo-American stock in the hands of the Petitioners was its fair market value on May 20, 1913, adjusted for intervening changes. The Circuit Court of Appeals for the Second Circuit affirmed the orders of the Board (No. 734, R. 94; No. 735, R. 48; No. 736, R. 46; No. 737, R. 45). The present proceedings are brought to review the orders of the Circuit Court of Appeals for the Second Circuit.

SPECIFICATION OF ERRORS

Petitioners urge that the Circuit Court of Appeals for the Second Circuit erred:

(1) in holding that these cases were ruled by the decision of this Court in the case of *Helvering* v. *Hallock,* 309 U. S. 106 (1940); and

(2) in affirming the orders of the Board and in failing to reverse and set aside such orders.

OUTLINE OF ARGUMENT

Whatever may be present views as to a desirable interpretation of the language used by Congress in § 113(a)(5), there cannot be any doubt whatever that on May 10, 1934, when the Revenue Act of 1934 was enacted, the accepted interpretation was that legatees did not acquire property until a substantial interest therein became vested. That interpretation may or may not have been based upon a misunderstanding of the decision in *Brewster* v. *Gage,* 280 U. S. 327 (1930). The controlling fact is that at that

time *Brewster* v. *Gage* was not understood to apply to legatees who did not have a substantial interest in the property involved. At that time "acquisition of property" meant acquisition of the property which was sold and which gave rise to the gain sought to be taxed and did not mean the acquisition of a tenuous right to acquire some property in the future.

1. From at least 1920 the Bureau of Internal Revenue had consistently held that "one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested". G. C. M. 10260, XI-1 C. B. 79, 80. That Memorandum of the General Counsel for the Bureau of Internal Revenue distinguished *Brewster* v. *Gage*.

2. Various Circuit Courts of Appeals had consistently held or stated the same rule. They distinguished *Brewster* v. *Gage*.

3. The Reports of Congressional Committees and the legislative history of § 113(a)(5) show that Congress intended to abolish the difference of treatment of legacies of real and personal property but did not intend to depart from the well-settled construction of the language of § 113(a)(5). In 192[illegible] Congress had deliberately rejected a provision which would have been consistent with the more recently discovered so-called "value-at-death principle." That "principle" was a concept first enunciated in Regulations 86 published February 11, 1935, in the year following some of the transactions involved in these cases.

In brief, every applicable test for determining the intention of Congress in reenacting in § 113(a)(5) of the Revenue Act of 1934 language which had appeared in the Revenue Acts of 1926 and prior years shows that Congress was not departing from the well-settled and obvious construction of that language.

This Court in *Helvering* v. *San Joaquin Co.*, 297 U. S. 496 (1936), clearly drew the distinction between the acquisition of property and the acquisition of an interest therein.

The cases of *Maguire* v. *Commissioner*, *Helvering* v. *Gambrill* and *Helvering* v. *Campbell* involved the Revenue Acts of 1928 and 1932 wherein Congress departed from the language used in the Revenue Acts of 1934, 1926 and prior years. The language of the 1928 Act did not have any background of departmental or judicial interpretation. Those cases cannot, therefore, be decisive of the interpretation of § 113(a)(5) of the Revenue Acts of 1934 and 1936 involved in the instant cases the provisions of which had had a long history of departmental and judicial interpretation.

The instant cases involve provisions of law and considerations not involved in the *Maguire* and companion cases, and involve in part transactions which took place in the year 1934 prior to the promulgation on February 11, 1935, of Regulations 86 which first prescribe the rule now sought to be applied.

ARGUMENT

I

AT THE TIME OF THE ENACTMENT OF THE REVENUE ACT OF 1934 THE PHRASE "TIME OF ACQUISITION" AS USED IN SECTION 113(a)(5) HAD BEEN DEFINED BY LONG-CONTINUED DEPARTMENTAL INTERPRETATION, JUDICIAL DECISIONS AND LEGISLATIVE HISTORY TO MEAN THAT LEGATEES DID NOT ACQUIRE PROPERTY UNTIL A SUBSTANTIAL INTEREST THEREIN BECAME VESTED IN THEM.

In *Van Vranken* v. *Helvering,* 115 F. (2d) 709, 711 (C. C. A. 2nd, December 2, 1940), upon the authority of which the instant cases were decided, the Court below indicated in the following language that it was departing from well-settled canons of statutory construction:

> "At times one is more likely to reach the truth by an unanalyzed and intuitive conclusion from the text as a whole, than by following, step by step, the accredited guides. Therefore, while without Helvering v. Hallock, supra (309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368), we should probably have felt obliged to hold that the statute incorporated the earlier rulings of the lower courts, it appears to us that with that decision before us, we should not preserve what would now be no more than an egregious exception in the fiscal scheme as a whole."

We submit (reversing the sense of the foregoing language) that the Court below was bound to "preserve" the statute as written by Congress in the light of the then

existing rulings and decisions even though the Court six and a half years later reaches the "unanalyzed and intuitive conclusion" that the rule prescribed by Congress is *now* "no more than an egregious exception[1] in the fiscal scheme as a whole." Exception or no exception the rule was prescribed by Congress and should have been "preserved".

We believe that the Court below misunderstood and misapplied the *Hallock* case. Mr. Justice Frankfurter carefully pointed out in the *Hallock* case that the doctrine of Congressional adoption of long-standing administrative construction was not involved. Thus he said at footnote 7, p. 121:

> "Here, unlike the situation in such cases as *National Lead Co.* v. *United States,* 252 U. S. 140, 146-47, and *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302-3, we have no conjunction of long, uniform administrative construction and subsequent re-enactments of an ambiguous statute to give ground for implying legislative adoption of such construction. * * *"

Again, in the text at p. 122, this Court said: "Our problem then is not that of rejecting a settled statutory construction."

Judge Dobie, speaking for the majority in *Helvering* v. *Dunning,* 1941 P-H Fed. Tax Serv. § 62,522 (C. C. A. 4th, March 10, 1941), recognized this feature of the *Hallock* case when he said:

> "The Supreme Court had distinctly recognized in the earlier decision of Helvering v. Hallock, supra that the problem therein was 'not that of rejecting

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[1]That it is not an only exception see the discussion of Art. 13, Regulations 80, *infra,* page 35.

> a settled statutory construction.' (309 U. S. at p. 122.) Here, we are dealing with a statutory construction and, as a result, our viewpoint and considerations must at times be technical."

In the instant cases, then, it is of primary importance that when Congress enacted the Revenue Act of 1934 there existed a uniform administrative construction of the language incorporated in § 113(a)(5) of at least fourteen years' standing. Further, at least three courts had uniformly construed this language before the 1934 Act was passed. The Bureau and the Courts had held that *Brewster* v. *Gage* did not apply when the legatee did not have a substantial interest in the property. Under these circumstances Congress must be deemed to have adopted this uniform construction by its reenactment of the language contained in § 113(a)(5), and the Commissioner's Regulations, inconsistent therewith, are invalid. *Helvering* v. *Janney; Taft* v. *Helvering; Helvering* v. *Oregon Mutual Life Insurance Company* (311 U. S. 189, 195 and 267, all decided December 9, 1940).[1]

A. Departmental Interpretation.

Beginning as early as 1920 in interpreting the language which appears in §113(a)(5) of the Revenue Acts of 1934 and 1936, the Bureau of Internal Revenue consistently held until nearly a year after the enactment of the Revenue Act of 1934 that legatees do not acquire property until a substantial interest therein becomes vested in them. O. D. 727, 3 C. B. 53, published in 1920, reads as follows:

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[1]Note that each case struck down an attempt of the Commissioner of Internal Revenue by Regulations 86 involved in the instant cases to change the meaning of various sections of the Revenue Act of 1934.

> "Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant."

Twelve years later in 1932 the General Counsel for the Bureau of Internal Revenue in G. C. M. 10260, XI-1 C. B. 79, 80, said:

> "* * * the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) (See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 50.)"

That Memorandum cited and distinguished *Brewster* v. *Gage*. See also G. C. M. 11309, XII-1 C. B. 126 (1933). The earlier Memorandum, G. C. M. 6195, VIII-1 C. B. 99 (1929), is not contrary to the long-established Departmental interpretation but is in support of it because the facts set forth in that Memorandum show that the remainderman upon creation of the trust "became substantially the owner of the property".

The Court below, therefore, in holding contrary to the contention of the Petitioners ignored a consistent Departmental interpretation extending from 1920 to 1934 during which period were enacted the Revenue Acts of 1921, 1924, 1926 and 1934 which all contained provisions identical with those involved in these cases.

B. Judicial Interpretation.

In 1930, two years after the enactment of the Revenue Act of 1928, the Supreme Court decided the case of

Brewster v. *Gage*, 280 U. S. 327. That case arose under the Revenue Acts of 1918 and 1921, the latter Act containing a provision identical with that involved in the instant cases. The legatee was left directly, with no intervening estate, a vested interest in the residue of the estate, subject to no contingency or condition. The Court, in holding that the basis of the property acquired by the legatee was determined by its value at the decedent's death, said at p. 334: "Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property."

It has since been consistently held (at least until within a few months) that the doctrine of *Brewster* v. *Gage* does not cover property acquired pursuant to contingent legacies.

Perhaps the leading case that has established the rule to be applied to contingent interests is the case of *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9th, 1933), *cert. den.*, 290 U. S. 656 (1933), which was decided well before Congress enacted the Revenue Act of 1934. In that case the facts were similar to those of the instant cases. There the testatrix devised certain real property in trust for a term of years, and at the expiration of the trust to "such of my children as shall be living at the expiration of such trust, share and share alike," with limitations over if any child should then be dead. Testatrix died in 1914, the trust terminated July 25, 1923, and distribution of the property in question was made on July 26, 1923. Petitioners sold the property between July 29, 1923, and August 1 of that year. The question before the Court was what constituted the proper basis for determining income realized

on the sale. This depended upon the meaning of the term "acquisition" as used in the Revenue Act of 1921—the same Act under which the Supreme Court had decided *Brewster* v. *Gage* in 1930. In holding that petitioners "acquired" the property at the date of termination of the trust the Court said at pp. 864-865:

> "It is not questioned that a person cannot be said to have 'acquired' property within the meaning of the Revenue Act, § 202(a)(3), supra, before he has some substantial ownership therein. If his interest is contingent upon the happening of some future event, until the happening of that contingency when his interest becomes vested, he has merely a possibility of acquiring an estate and cannot be said to have any substantial ownership therein. The rulings of the Department of Internal Revenue have consistently been to the effect that where one has merely a contingent interest in property he does not 'acquire' that property until his interest becomes vested. The general counsel of the Treasury Department, in a recent ruling (G. C. M. 10,260, XI-1 C. B. 79, March, 1932), in discussing a question similar to that presented in the case at bar, stated:
>
> "'* * * the position of this office has been that one who has a mere contingent interest does not "acquire" the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) (See, also, I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50.)'
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> * * * * * * * *
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> "The cases of Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457, and Chandler v. Field (C. C. A. 1) 63 F. (2d) 13, are not controlling here. In each of those cases the interest of the taxpayer

became vested immediately upon the death of the testator."

Several cases have arisen under § 204(a)(5) of the Revenue Act of 1926, the language of which is practically identical with the language of § 113(a)(5) of the Revenue Acts of 1934 and 1936. In those cases the courts determined that the interests in question were vested and that, therefore, the property was "acquired" on the date of death of the testator. All the cases make it clear, however, that the decisions are based on the fact that the interests before the courts were vested at the testator's death and that different results would have been reached had the interests, as in the instant cases, been contingent.

See *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2d, 1934), *cert. den.*, 293 U. S. 620 (1934), decided under § 204(a)(5) of the Revenue Act of 1926; *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3d, 1935); *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3d, 1935), *cert. den.*, 296 U. S. 620 (1935); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th, January 26, 1934), *cert. den.*, 293 U. S. 560 (1934), decided under § 204(a)(5) of the Revenue Acts of 1924 and 1926; and *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A. 7th, 1934).

In at least three cases decided before the enactment of the Revenue Act of 1934 the courts had shown that they did not understand that a legatee "acquired" property before he had a substantial interest therein. *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d, 1933), *cert. den.*, 290 U. S. 644 (1933); *Pringle* v. *Commissioner*, *supra* (1933); and *Anchor Realty & Investment Co.* v. *Becker*, 3 F. Supp. 22 (E. D. Mo. 1933), *aff'd.*, 71 F. (2d) 355. The same rule was recognized in other cases decided before the enactment

of the Revenue Act of 1934, where, however, the remainder was found to be vested. *Chandler* v. *Field,* 63 F. (2d) 13 (C. C. A. 1st, 1933), *cert. den.,* 289 U. S. 758 (1933); *Molter* v. *Commissioner,* 69 F. (2d) 7 (C. C. A. 7th, January 22, 1934); *Hopkins* v. *Commissioner, supra* (January 26, 1934).

The same construction has been uniformly followed through *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th, 1940), by the cases decided after the 1934 Act was enacted. It was even recognized by the Board itself under the 1934 Act as late as November 24, 1939. *Elsie Van Vranken,* 40 B. T. A. 956, petition for certiorari pending before this Court. It was only when the Court below ignored legislative history and all canons of statutory construction in the *Van Vranken* case and reached its "unalyzed and intuitive conclusion" that any court gave recognition to a "value-at-death principle." Prior to that time the courts were satisfied with the plain import of the word "acquired" which is "obtained as one's own." See *Helvering* v. *San Joaquin Co., infra,* pages 32, 33. We are not herein contending that the word "acquired" cannot have the meaning which this Court appears to have given it in the recent *Maguire* and companion cases which arose under the Revenue Acts of 1928 and 1932 but we insist that it did not have that meaning when used by Congress in § 113(a)(5) of the Revenue Acts of 1934 and 1936. It is the then definition of the word that controls the construction of that section.

C. Legislative History.

From the Revenue Act of 1921 through the Revenue Act of 1926, the language of what corresponded to

§ 113(a)(5) of the Revenue Act of 1934 remained unchanged.

In 1926, the Court of Claims, in *McKinney* v. *United States,* 62 Ct. Cl. 180, *cert. den.,* 273 U. S. 716 (1926), decided that, under § 202 of the Revenue Act of 1918, the basis for determining gain or loss on the sale of stock during the period of administration by executors of an estate was the basis of the property in the hands of the decedent and not the value of the property at the decedent's death. In order to change this "inconvenient" rule the Congressional Joint Committee on Internal Revenue Taxation suggested that the rule, whereby the basis was the value of the property at decedent's death, "seems preferable, and it is recommended that it be set forth in the statute." The Report of the House Ways and Means Committee[1] stated at p. 18:

> "In view of the decision of the Court of Claims in McKinney v. United States, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a)(5).
>
> "It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.
>
> "Under existing law, the basis in such a case is the value at the date of 'acquisition', which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis."

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[1] 70th Congress, 1st Session, House of Representatives Report No. 2, Union Calendar No. 3.

Accordingly, the House Bill (H. R. 1, 70th Congress, 1st Session) provided in § 113(a)(5) that, "If the property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property *at the time of the death of the decedent.* * * *" [Italics supplied.] By such language the House of Representatives expressed exactly the meaning that the Treasury Department now contends that Congress intended to express in § 113(a)(5) of the Revenue Act of 1934. This provision, however, was not acceptable to the Senate. The Bill, as reported by the Senate Finance Committee, provided in § 113(a)(5) as follows:

> "If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

In a detailed discussion of the change made from the House Bill the Report of the Senate Finance Committee reads in part as follows:

> "Accordingly, the committee has revised section 113(a)(5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of

> the decedent. *In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death,* and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. *In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer.* The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but, for example, by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."[1] [Italics supplied.]

The provision recommended by the Senate Committee was adopted by Congress in the Revenue Act of 1928 and was reenacted in the same form in § 113(a)(5) of the Revenue Act of 1932. The effect of the change was a specific recognition that in cases where the beneficiary obtains a substantial interest in the property immediately upon the decedent's death, the proper basis is the value of the property at the date of death; in all other cases (including obviously such contingent bequests as are involved in the instant cases) the basis was to be the value at the time of distribution.

Thus we see that from 1921 to 1928 the statutes contained a provision identical with that which is now before this Court, while from 1928 to 1934 entirely different language was contained in § 113(a)(5). Beginning again

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[1] Senate Report No. 960, 70th Congress, 1st Session, p. 26.

with the 1934 Act, the language of the Acts prior to that of 1928 has been reinstated and continued. In making the change in 1928, however, Congress expressly rejected a wording of the statute which would have made the date of death of the decedent the basic date in all cases. It should also be noted that no specific reference was made at that time, or at any other time, to the problem of contingent interests. The legislative history down to the Revenue Act of 1934 discloses, therefore, a complete absence of any evidence of an intention on the part of Congress to provide that in the case of property acquired by bequest, devise or inheritance the basis in all cases should be the value thereof at the date of death of the decedent. On the contrary, in the only instance in which the question was directly presented to Congress, Congress, after careful consideration evidenced by action by the House and reversal by the Senate and in conference, rejected such provisions.

In 1934 Congress changed from the language used in §113(a)(5) of the Revenue Acts of 1928 and 1932 back to the language used in the Revenue Act of 1926 and prior Acts. In the absence of positive evidence of some other intention on the part of Congress, elementary rules of statutory construction require that the language reenacted in the Revenue Act of 1934 should be construed as was the same language in the Revenue Act of 1926 and prior Revenue Acts.

On December 4, 1933, a subcommittee of the Committee on Ways and Means submitted a Report entitled "Prevention of Tax Avoidance" which in speaking of § 113(a)(5) of the Revenue Act of 1932 made the following comment at p. 17:

> "Included within the phrase 'all other cases' is personal property acquired by general or residuary

bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

"Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

"Section 113(a)(5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) Your subcommittee recommends that section 113(a)(5) of the Revenue Act of 1932 be changed to conform to the language contained in the Revenue Act of 1926, so that a

uniform basis rule may be required in the case of property passing at death, whether real or personal."

The proposed change was opposed by the Treasury Department "in accordance with the policy that no change should be made unless it results in a material improvement of the statute."[1] Nevertheless Congress did adopt the proposal to revert to the language of the Revenue Act of 1926 and prior acts the meaning of which had become crystallized through frequent interpretations.

The intention was to revert to the "uniform rule" established under the Revenue Act of 1926 and prior Revenue Acts as interpreted by the courts and the Bureau of Internal Revenue and to get away from the distinctions between real and certain classes of personal property established by the Revenue Act of 1928. The principal motive for reversion to the earlier language appears to have been the desire to prevent an executor of an estate from having a profitable choice of basis when the executor was also the trustee of a trust established by the will of the decedent.[2]

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[1]Statement of the Acting Secretary of the Treasury (p. 16, 1933).

[2]In this connection we advert to the argument of this Court in the *Maguire* case based upon not imputing "to Congress a purpose to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes". This argument is referred to in the Motion to Reverse (p. 4) now pending in *Helvering* v. *Reynolds*, No. 684. We respectfully submit that upon further consideration the argument will be seen to have no validity. Under the doctrine of *Brewster* v. *Gage*, the basis of property in the hands of the trustees is a fixed quantity, viz., value at death. Let us say that is $10. The basis in the hands of the remainderman may be value at death, value at time of distribution to the trustees, or value at time of distribution by the trustees to the remainderman as this Court

In the absence of evidence to the contrary it must be assumed that Congress and its advisors approved of the distinction between vested and contingent interests.

The Reports of the House Ways and Means Committee and the Senate Finance Committee set forth in the Appendix at pp. viii-xi follow the language of the Subcommittee Report and confirm that Congress had only in mind the establishment of a "uniform rule" as between classes of property and had no intention of abolishing the well-established distinction between vested and contingent interests.

D. Cases under the Revenue Acts of 1928 and 1932 do not resolve the questions in the instant cases.

This Court, on March 31, 1941, decided the cases of *Maguire* v. *Commissioner, Helvering* v. *Gambrill* and *Helvering* v. *Campbell,* under § 113(a)(5) of the Revenue Acts of 1928 and 1932. Those cases involved the question of whether a distribution of assets by the executor of an estate to the trustee of a testamentary trust constituted a distribution to a remainderman of the trust. This Court held that such a distribution to the trustee was a distribution to the remainderman. This Court further ruled that, for purposes of determining whether subsequent gains on the sale of assets acquired by bequest were long term or short term capital gains under § 101(c)(8), the property

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may decide. In other words it may be $10, $11, or $12, or it may be $10, $9, or $8. Under the *Maguire* decision it would be either $11 or $9 as compared with the $10 basis of the trustees. In any case, if the will permitted (which it did not in the instant cases), the trustees would have the option to sell the property or to distribute it in kind, as would be most advantageous for tax purposes.

was "held" by the remainderman from the date of death of the decedent.

Different provisions of law and different considerations are involved in the instant cases than were involved in the *Maguire, Gambrill* and *Campbell* cases. In the first place, this Court again pointed out, as in the *Hallock* case, that "We are not aided by administrative construction" because the administrative construction was by no means uniform. And in this respect, there was no helpful administrative construction at all before the enactment of § 113(a)(5) of the Revenue Act of 1928 because there had never before been any comparable provision in the internal revenue laws. In the instant cases, on the other hand, there was a consistent administrative construction of the language reenacted in § 113(a)(5) of the Revenue Act of 1934 originating 14 years earlier.

In the second place, the fixing of the basis as the value at the time of acquisition is not a mere "rule of thumb" but is a matter of substance related to the taxpayer's ownership of the thing the sale of which gave rise to the income. In all the talk about wills, bequests, contingencies, vestings, estates, etc., courts seem to lose touch with the realities of the problem. The problem is simply how much of the selling price of certain definite property sold by the taxpayer shall be treated as income to him. A method obviously fair from the point of view of the taxpayer would be to tax so much of the selling price as is equal to the difference between the value at the time the taxpayer acquired the property and the amount realized by him on the sale. Looked at from that point of view, the date of acquisition is a matter of substance, and Congress has shown in its Committee Reports (*e. g.* the reports in connection with

the Revenue Act of 1928, Appendix, *infra*, pp. vi, vii) that it was sensitive to the question as to when the taxpayer acquired substantial interest in the property in question. In those reports, it is indicated that when, as a matter of substance, the property for all practical purposes vested in the beneficiary immediately upon the decedent's death, the value as of that date should be taken as the basis. In that law, in cases where the property did not vest as of date of death, Congress saw fit to apply a rule which this Court has now characterized as a "rule of thumb", but that action on the part of Congress, however characterized, does not negative the proposition that acquisition of itself is a matter of substance. In the Revenue Act of 1934, Congress abandoned the "rule of thumb" and returned to the substantial test as to when the property was acquired.

In the instant cases, under § 113(a)(5) of the Revenue Acts of 1934 and 1936, the problem is not that of looking back to "a point of reference" to determine gain or loss on property later acquired. There is, of course, no question that at the time of the sales which gave rise to the gain the property had been acquired by the taxpayers, nor is there any question that the acquisition was by bequest. Our problem is to determine the *time* of acquisition. This was not meant by Congress to be a mere "rule of thumb". It was something of substance, directly connected with the taxpayer's ownership of the property sold. At the date of the Testator's death there had certainly been no distribution of the property to the taxpayers in the instant cases.

The Petitioners in the instant cases were twice removed from acquiring any property at the date of death of the Testator. At the date of death the Executors acquired certain property. Later they distributed certain property to

the Trustees. Much later the Trustees distributed the property in question to the Petitioners. It need not even have been the property acquired by the Executors. The will would have been complied with if the Trustees had purchased the required stock. We submit that the decision that the phrase "time of the distribution to the taxpayer" means time of distribution to trustees is not a satisfactory basis for deciding the meaning of the phrase "time of acquisition." We also submit that a decision as to the length of time property was "held" under § 101(c)(8) is also an unsatisfactory basis for deciding the meaning of that phrase.

E. In any event, Regulation 86, promulgated February 11, 1935, cannot affect retroactively tax liability for 1934.

Petitioners contend that the judicial and administrative construction of the word "acquired" was incorporated into § 113(a)(5) of the Revenue Act of 1934 and subsequent Acts and that the attempt on the part of the Commissioner to change that meaning retroactively or prospectively is absolutely void and of no effect whatever. The tax liability of two of the Petitioners, however, involves the year 1934, and as to them, in any event, Regulations 86 cannot retroactively affect their liability for a year prior to the promulgation of the Regulations. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1938).

The Petitioners so situated are Jean Louise Matthews (No. 737, R. 26) and Harry Harkness Flagler (No. 735, R. 28).

For the reasons set forth in this subdivision E as well as for the reasons set forth in subdivision D the instant cases are not decided by the *Maguire* and companion cases.

II.

THE PETITIONERS HEREIN DID NOT ACQUIRE THE PROPERTY SOLD IN 1934 AND 1936 PRIOR TO THE TERMINATION OF THE TRUST CREATED UNDER THE WILL OF HENRY M. FLAGLER.

We do not question that these Petitioners acquired at the date of death of Henry M. Flagler an interest in his Estate. They acquired legacies which were valuable and which doubtless could have been assigned for a substantial consideration. The interest in the Testator's Estate, however, was not the property sold, giving rise to the gain sought to be taxed. Corporate stock was sold and the question is when was that stock acquired. This distinction between the question as posed by the Court below and the question as we believe it to be is indicated in the decision of this Court in the case of *Helvering* v. *San Joaquin Co.*, 297 U. S. 496 (1936). In that case, which we believe to be decisive of the question involved in the instant cases, this Court said at pp. 498-9:

> "The option itself was property, and doubtless was valuable. * * * But the option is admittedly not the same property as the land. * * * But even if we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense."

As this Court indicated above, there is no magic to the meaning of the word "acquired". It is defined in Webster's New International Dictionary (2d Ed., 1935), p. 23: "To gain by any means * * * to get as one's own * * * ." See also *National Surety Co.* v. *McGreevy,* 64 F. (2d) 899 (C. C. A. 8th, 1933), *cert. den.,* 290 U. S. 644 (1933), wherein the Court said at p. 901: "The word 'acquired,' as used in this contract, means to become the owner of."

This was recognized to be the correct meaning of "acquired" by the Bureau in G. C. M. 10260, XI-1 C. B. 79, 96 (1932). "Contingent beneficiaries or remaindermen are not regarded as having 'acquired' property under the Revenue Acts, and, consequently, in such cases 'distribution,' as well as acquisition, is necessarily contingent until substantial ownership vests, at which time distribution to them is automatically concluded."

We believe, then, that the controlling factor should be substantial ownership. Whenever the taxpayer has *ownership of the property which is later sold* in some substantial degree, and not before, he has acquired that property. If this is the correct rule, as we believe it to be, it is obvious that the description of a legacy as "contingent," "vested" or "vested subject to be divested" is of no primary importance, but it may be of assistance in getting at the ultimate determinant. This was recognized in G. C. M. 10260, *supra,* at page 97, wherein it was said:

> "No one of these things is decisive; the question is whether the taxpayer has acquired sufficiently substantial ownership to satisfy the spirit and purpose of section 113(a)5, and in general, an interest which is vested, subject to being divested, does not give a taxpayer that kind of ownership."

This is merely to apply the well-known statement by Mr. Justice Holmes in *Corliss* v. *Bowers,* 281 U. S. 376, 378 (1930): "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

A situation that could have arisen in the instant cases makes it evident that the only workable rule is that substantial ownership is necessary before property can be acquired. Suppose, for instance, one of the three children of Harry Harkness Flagler had died after the death of the Testator but before the termination of the trust. Then by the express terms of the Testator's will the stock bequeathed to this class would have been divided between the two surviving grandchildren of the Testator. Would the two surviving members of the class have "acquired" their extra one-sixth part of the bequest at the date of the Testator's death? That could only be so if two separate individuals may acquire the same thing at the same time. And if this could be done it is saying, in effect, that each of the Testator's three grandchildren acquired at the Testator's death the whole of what was left to the class. We believe that Congress did not intend to put this interpretation on the word "acquired".

Further, in the above example, let us assume, with the Commissioner, that the stock was acquired by the grandchildren on the death of the Testator. § 811(a) of the Internal Revenue Code provides that the value of the gross estate of a decedent, for estate tax purposes, shall include the value of all property, tangible or intangible, "To the extent of the interest therein of the decedent at the time of his

death." If, then, one of the grandchildren had died after May 20, 1913 and before May 20, 1923, she would, under the Commissioner's theory, have acquired certain stock on May 20, 1913, and we would suppose that the value of that stock would be includible in her gross estate for estate tax purposes. This would be so because the property, if admittedly having been acquired, had never been disposed of prior to death. Therefore it must have been property in which the decedent had an interest at the time of his death. The Commissioner, however, has recognized that this is so obviously not the law that he provides in Regulations 80, Article 13 (as amended by T. D. 5042, March 1, 1941), that nothing need be included in the value of the gross estate on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at death. This is a recognition that the property which constitutes the subject of a contingent remainder is not acquired until the contingency happens. Also, we might note that apparently the Commissioner does not anticipate too much difficulty in being able to determine what legacies are contingent, and this Treasury Decision was promulgated a year after this Court decided the *Hallock* case.

A reading of the facts in these cases indicates clearly that the Petitioners did not acquire any substantial interest in the property which they sold in 1934 and 1936 prior to the termination of the trust. Moreover, as will now be demonstrated, their interests under the will were contingent and, accordingly, they can not be held to have acquired the property under the narrower but well-established rule that a contingent legatee does not acquire property until his interest vests.

A. Under Florida law Petitioners took only contingent interests under the will.

The question whether a legatee received a vested or a contingent interest under a will must be determined by applying the law of the testator's domicile, particularly if the will was probated in that state. *Uterhart* v. *United States,* 240 U. S. 598 (1916).[1] The State of Florida was the Testator's domicile and the place where the will of the Testator was probated.

The State of Florida has no statute defining the terms "vested" and "contingent", and the question of the category into which the legacies involved in these cases fall must be resolved by applying the common law as interpreted by the Supreme Court of the State of Florida.

There must be a certainty of the right to possession before a remainder can be vested. As expressed by 1 Simes, Law of Future Interests § 67 (1936):

> "In other words, in the vested remainder a right to possession at some time in the future was thought of as having present existence; in the contingent remainder, there was only a condition precedent on the happening of which a right to possession would come into existence."

Although it is often said that the law favors the early vesting of estates, the intention of the testator is a rule of construction in the exposition of wills to which "all others must bend." *Dean* v. *Crews,* 77 Fla. 319, 81 So. 479 (1919).

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[1]See also *Commissioner* v. *Kellog,* 1941 P-H Fed. Tax Serv. § 62,547 (C. C. A. 3d, March 20, 1941).

> "To ascertain and give effect to the intent of the testator is the cardinal rule of testamentary construction. * * * The intention of the testator is to be gathered from a consideration of all the provisions of the will taken together, rather than from detached portions or any particular form of words. This rule prevails whether the entire will or some specific clause or part of it is being construed." *Sorrels* v. *McNally,* 89 Fla. 457, 105 So. 106, 109 (1925).

See also Thompson, Wills § 361 (2d Ed. 1936).

When the intention of the testator as disclosed by the provisions of the will is not clear, the Florida Supreme Court has indulged in various presumptions as an aid in determining what the actual intent was. Thus, one of the strongest arguments in favor of vesting is a provision for the enjoyment of the income by the legatee prior to coming into possession of the property. Also, the absence of a gift over in case the legatee dies before he comes into possession of the property shows that the testator wanted the gifts to be vested. On the other hand, if the income from the principal amount of the gift goes to another than the legatee and if there is a gift over in the event that the legatee does not take because of his death prior to the termination of the preceding estate, the presumption should be that the testator intended to give only a contingent legacy.[1]

1. PETITIONERS IN NOS. 734 AND 737.

The Petitioners, Mary Flagler Cary and Jean Louise Matthews, in Nos. 734 and 737, were two of the three

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[1]Cf. *Sorrels* v. *McNally, supra,* 105 So. 106, 110, 111; *Rowland* v. *Miller, infra,* 88 So. 263, 264.

children of Harry Harkness Flagler and were grandchildren of the Testator. In the only reference in the will of the Testator to the bequest to these Petitioners it was provided as follows:

> "And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made as to such eight thousand shares of stock."[1]

No possible construction can be placed on the legacies to these Petitioners except that the legacies were contingent, subject to the condition precedent that Petitioners would survive the trust term. The language employed is not that of a present gift to come into possession or enjoyment in the future; the gift itself is future.[2] Further, the income of the trust property was never to go to Petitioners and there was a provision for a gift over if none of Testator's grandchildren was living at the termination of the trust—both strong arguments against vesting.

The above conclusion is fully sustained by the decisions of the Supreme Court of the State of Florida. In *Paul* v. *Frierson,* 21 Fla. 529 (1885), a trust deed provided for

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[1]Item Seventh of last will and testament, R. 25, 26.
[2]Simes, *op. cit. supra,* § 351.

property to go to grantor's wife for life, "and at her death the said property * * * shall be equally divided among such of her children by me begotten as she may leave surviving her. * * *" The question arose as to the inheritability of the interest of a child (Mrs. Paul) who died during the life-time of grantor's wife (Mrs. Frierson). The Court held as follows:

> "The language in the deed in our opinion gave to Mrs. Paul a contingent remainder. There are no words in it which will justify us in construing it as vesting a present fixed right with only the time of actual enjoyment as uncertain. * * *
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> * * * * * * *
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> "Two things were necessary to determine the right—the death of Mrs. Frierson, and the fact that Mrs. Paul was living at the time of her death. It was uncertain whether the right to the estate would ever vest in Mrs. Paul, and this uncertainty made her interest in it contingent."

The granting clause in the *Paul* case divides the property "at her death * * * among such of her children * * * as she may leave surviving her." Item Seventh of the will of Henry M. Flagler directs the delivery of certain stocks "at the expiration of said trust * * * to such child or children as shall then be living."

In *Rewis* v. *Rewis,* 79 Fla. 126, 84 So. 93, 94 (1920), testatrix devised certain realty to her daughter for life, "and at her death to go to her living children." In a suit to partition, the question arose as to the interest of a child who had died during the continuance of the life estate. The Court held:

> "* * * Having devised the property to her daughter 'to have and to hold during her lifetime,' it was

> not necessary to employ the words 'and at her death' to go to her living children unless it was the intention of the testratrix by such quoted words to fix the meaning of 'her living children' as those living at the death of the life tenant.
>
> "The uncertainty as to which of the life tenant's children would survive her made the remainders 'at her death to go to her living children' contingent, and not vested, remainders. * * *"

Here again, the phrase "at her death to go to her living children" is quite similar to the clause in the Flagler will directs the delivery of property "at the expiration of said trust * * * to such child or children as shall then be living."

In *Dean* v. *Crews,* 77 Fla. 319, 81 So. 479, 480 (1919), testator in his will provided that "if when said youngest daughter shall have reached the age of twenty-one years, there shall remain in the hands of the executor of this will more than the sum of three thousand dollars, then the surplus * * * shall be distributed" among four named children. Two of these children died before the youngest daughter reached twenty-one. In deciding that the interests of the deceased children in this bequest were not inheritable, the Court said:

> "The next bequest is clearly to become vested, if at all, when the youngest daughter reaches the age of 21."

The granting clause in this will contains the word "then", as does the clause in the Flagler will which directs the delivery of certain stocks to the children of Harry Harkness Flagler.

In *Blocker* v. *Blocker,* 103 Fla. 285, 137 So. 249 (1931), the testator devised certain property to his son for life,

with remainder to such child or children as survive him, with limitations over if the son should not be survived by a child. The question arose as to whether the children's interest was destructible during the son's life estate. The Court held that, as the children had only contingent remainders, their interest was destructible.

At the time of the final publication of the will of Henry M. Flagler three children of Harry Harkness Flagler were living, including Petitioners in Nos. 734 and 737. The Testator, of course, knew that those three children were in being, yet he made it plain that less than three, and, indeed, none, of those children might take under the will. The members of the class that would take were unascertained until the termination of the trust term. As expressed by Thompson, *op. cit. supra*, § 367:

> "A bequest to one for life, and at her death to be equally divided among her children, creates a contingent remainder in the children, for, until the death of the life tenant [or the expiration of the trust term], it can not be ascertained which of her children will survive her."

The conclusion is inescapable, on authority and reason, and by virtue of the intention of the Testator as expressed in the will, that Petitioners in Nos. 734 and 737 took only contingent legacies.

2. Petitioners in Nos. 735 and 736.

As the stock sold by Annie L. Flagler, whose estate is Petitioner in No. 736, was received as a gift from her husband, Petitioner in No. 735, the time of acquisition of the stock sold by both of these individuals depends upon the

construction of the legacy to Harry Harkness Flagler, Petitioner in No. 735.

The following provisions in the will and codicils are the only expressions directly affecting the legacy to Harry Harkness Flagler:

> "Seventh: At the expiration of said trust, the Trustees shall deliver, assign, and transfer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son. * * *"[1]
>
> "I wish further to say, in explanation of the provision made in Item numbered 'Seventh' of my said last will and testament for my son Harry Harkness Flagler, that in case he should not be living at the time of my death or at the time of the expiration of the trust therein referred to * * *, then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate."[2]
>
> "It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate."[3]

It seems obvious that here also the Testator intended to make a contingent gift which was subject to the condition precedent that the legatee would survive the Testator and also be alive at the termination of the trust. The codicil

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[1]Item Seventh of last will and testament, R. 25, 26.

[2]Item Second of codicil of April 28, 1904, R. 34, 35.

[3]Item Second of codicil of September 13, 1913, R. 45.

of April 28, 1904, contains the condition that in case Harry Harkness Flagler "should not be living at the time of my death or at the time of the expiration of the trust" he should not take anything and the legacy "shall lapse". This provision adds only one condition but in order to be satisfied the legatee must be living at two distinct points of time. Obviously the condition in respect of surviving the Testator is a condition precedent. It would not be possible for the legatee to have any interest whatsoever in the legacy unless he survived the Testator. The same condition of being alive applies also to the termination of the trust. Thus what the Testator intended in connection with the one application of the condition must also apply to the other application of the same condition.

We have pointed out above that the whole will must be read in order to determine the Testator's intent as to any part thereof. An examination of the whole will shows that most of the legacies provided for in the will are contingent. Thus in Item Eighth[1] of the will bequests in various amounts were made to more than 25 named persons and institutions, with the proviso that none shall take "unless * * * living or in existence at the expiration of said trust." The legacies to the children of Harry Harkness Flagler probably throw more light on the Testator's intention in respect to the gift to him, however, than the legacies provided for in Item Eighth. In Item Seventh the Testator directed his Trustees to deliver shares of stock to Harry Harkness Flagler and also to the children of Harry Harkness Flagler. A reading of that whole Item shows that the Testator really intended to treat his son and his grandchildren in the same

[1]R. 26-28.

manner. He there took pains to explain why his son was not put in a preferred status.

Although the Testator undoubtedly intended for the two classes of gifts made in the Seventh Item of his will to be given the same interpretation, he later realized that, because of the loose wording of the gift to his son—the addition of the clause "which shares of stock are hereby given to my said son"—an explanation or clarification of the gift to his son would be necessary. In order to clear up this problem the Testator added a provision in his codicil of April 28, 1904, to the effect that "in case he should not be living at the time of my death or at the time of the expiration of the trust * * * then the legacy of shares of capital stock of the Standard Oil Company therein mentioned shall lapse and become a part of the residue of my estate." This provision effectually eliminated the words of present gift in the original will and left all the legacies provided for in Item Seventh contingent upon the legatees being alive at the expiration of the trust term.

Another reason for concluding that the legacy to Harry Harkness Flagler was contingent is that there was no provision for the enjoyment of the income from the stock by the legatee. By Items Sixth and Ninth of his will the Testator carefully provided that no part of the income of the trust should go to the Petitioners herein and in Item Fifth of the codicil of April 28, 1904, by naming a long list of persons to share in the residuary estate in case his wife should not survive him, he made certain that the Petitioners would not take such income and also made certain that neither the Petitioners nor any persons claiming under them would ever obtain any part of the residuary estate unless the contingencies attached to their bequests were ful-

filled. Indeed, the trustees had a power of invasion as to the principal of the gift, for they were empowered to use some or all of the shares in loans to the Testator's speculative Florida properties.[1] The gift over in the event that the legatee never came into possession of the property is a further indication of the Testator's intention to postpone vesting of the legacy. A reading of the Testator's remarks at the end of Item Seventh of his will and in Item First of the codicil of January 8, 1906, together with the several provisions contained in the will and the various codicils shows beyond any possibility of doubt the firm intention on the part of the Testator to leave nothing to his son or grandchildren unless they satisfied the condition of surviving the term of the trust.

In the case of the legacy to Harry Harkness Flagler as well as in the case of those to his children, authority, as well as reason, supports the conclusion that the legacy was contingent. In *Rowland* v. *Miller,* 81 Fla. 408, 88 So. 263 (1921), testator devised realty as follows:

> "I give and bequeath and devise to my nephew Eugene B. Rowland * * * lot 7 * * * . I desire this property to be held by my executors in trust until the said Eugene B. Rowland shall reach the age of twenty-five years * * * ; if he be not living I desire the property to be sold and the proceeds given to my niece * * * ."

The nephew died before reaching the age of twenty-five years, and the question arose as to the inheritability of his

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[1]Item Tenth of last will and testament, R. 28-30; and Item Third of the codicil of January 8, 1906, R. 38, 39.

interest. The Court held that the entire property belonged to the niece, saying:

> "If Eugene B. Rowland, of Michigan, the nephew, took under that clause any interest whatever in the land described therein, was it conditional or unconditional? Or was the taking of any interest by him made conditional upon his arriving at the age of 25 years? The first sentence of the clause, standing alone, is a complete devise in fee to Eugene B. Rowland of the land described. The second sentence, however, which is divided into two parts, evinces an intention just as clear that a complete devise in fee to Eugene B. Rowland was not intended, because the purpose is expressed to have the property held in trust by his executors, neither of whom was Eugene B. Rowland, of Michigan, until the latter should reach the age of 25 years. * * *
>
> * * * * * * * * *
>
> "Here, it seems to have been the testator's purpose that the legal estate should be in his executors. There was something to be done by them which made it necessary for them to have the legal estate. They were to collect rents, pay taxes and insurance, and pay over the residue to his brother, or in case of his death to the niece. Not even the beneficial estate became vested in the nephew."

The Court indicates that the wording of the legacy that is provided for by the clause, "if he be not living I desire the property to be sold and the proceeds" to go over, makes the gift contingent. Thus, the Court poses the question of whether "*any* interest" was taken before the nephew became 25, and the question is answered by saying that "not even

the beneficial estate became vested in the nephew". So it was with Harry Harkness Flagler.

There is a final consideration that proves beyond any doubt that the legacy under discussion in the Flagler will was contingent and not vested. In the codicil of April 28, 1904, it was provided that if the legatee should not be living at the time of the expiration of the trust term then the legacy to him "shall *lapse* and become a part of the residue of my estate." As hereinbefore indicated, the codicil of April 28, 1904, appears to have been drawn with some care to make clear the Testator's intention to make the bequest to his son contingent upon his surviving the trust. We must assume, therefore, that the word "lapse" was used by the draftsman advisedly and that he intended for it to have its usual meaning as a word of art in the law of wills, in order to effectuate the Testator's obvious desire to prefer his widow and others[1] over the personal representatives or appointees of the beneficiaries who failed to survive the trust.

The term has been defined by the Supreme Court of the State of Florida: "A lapsed legacy or devise is one which never vests because of (1) the death of the legatee, before the testator, or (2) if the legatee survive the testator he dies before his interest vests under the will." *Sorrels* v. *McNally,* 89 Fla. 457, 105 So. 106, 109 (1925). This definition is fully supported by other authorities.[2]

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[1]Item Fifth of codicil of April 28, 1904, R. 36.

[2]The word "lapse" refers "to the failure of the devise * * * to take effect." *Gredig* v. *Sterling,* 47 F. (2d) 832, 834 (C. C. A. 5th, 1931), *cert. den.* 284 U. S. 629 (1931). A "lapsed legacy" is one which has never vested or taken effect. *In re Harrington's Will,* 243 App. Div. 235, 276 N. Y. Supp. 868 (4th Dept., 1935); *In re Walter's Estate,* 150 Misc. 512, 516; 269 N. Y. Supp. 402 (N. Y. Co. 1934).

By using the word "lapse" to describe what would happen to the legacy if his son died at any time prior to the termination of the trust the Testator clearly showed his intention to make the legacy contingent upon his son being alive at the time that he was to take possession of the gift. If Harry Harkness Flagler had died during the interim between the Testator's death and the termination of the trust the legacy would have "lapsed", *i.e.*, never have been vested. That the legatee did not in fact die during this period does not change the type of estate that he had[1]—if, indeed, what he had can be dignified by being called an estate of any kind. When the word "lapse" may apply to a legacy there does not exist any kind of estate or property right in the so-called legatee. The estate in the legatee certainly could never vest so long as there was a possibility that the legacy might lapse.

In the only case[2] that your Petitioners have found involving this precise point, the Court of Appeals of New York held that because the testator had provided that the legacy should lapse if the condition attached to the gift was not fulfilled the legacy must necessarily have been contingent. The will in that case provided in part as follows:

> "I give to the Baptist Church * * * the sum of ten thousand dollars * * * towards paying the mortgage and other debts of said church, provided said church shall raise a sum sufficient, with this legacy, to pay off such mortgage and other debts of said church within two years of my decease; and in case

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[1] *Forbes* v. *Commissioner*, 82 F. (2d) 204 (C. C. A. 1st, 1936).

[2] *Booth* v. *Baptist Church*, 126 N. Y. 215 (1891).

of failure to do this, then this legacy shall lapse and go into the residuum of my estate."

This legacy was attacked by the relatives of the Testator on the ground that it unlawfully suspended the power of alienation. This depended upon whether the legacy was vested or contingent. If the latter—the condition being precedent—the legacy must fall.

In holding that the legacy was void the Court at page 242 said:

> "We are asked to say that the legacy vested at the death of the testator, and that the condition imposed was both a condition subsequent and within the power of the legatee to perform through the action of its own members. * * * There are no technical words which indicate the difference between conditions precedent and subsequent, and the question is always one of intention. * * * In the present case it is quite clear that the proviso qualified the vesting of the gift. The testator's purpose was not to give at all unless by the process the church debt could be effectually wiped out. He meant that his proposed legacy should serve as an inducement or stimulant to open the purses of the church members, and to withhold his liberality unless they manifested theirs. He makes it quite clear that there is to be no gift until his condition is fulfilled, for he treats the fund as belonging to his estate and subject to his absolute disposition if the condition is not performed. He provides that in such event the 'legacy shall lapse and go into the residuum' of his estate. A lapsed legacy is one which has never vested or taken effect. It has been defined as 'one which, originally valid, afterwards fails because the capacity or willingness of the donee to take has ceased to exist before he

> obtained a vested interest in the gift.' * * * The provisions for a lapse is the reverse of a forfeiture. The words 'shall go into the residuum' further indicate the testator's understanding that until conditions performed, and within the specified period, he could dispose of the fund as he pleased, and without resort to proceedings for a forfeiture. * * * The gift to the church, therefore, was upon a condition precedent, did not vest at the date of the testator's death, but the ownership was left in abeyance awaiting the result of a contingency, and effected a suspension not measured by lives. We must, therefore, declare it invalid."

Accordingly, it must be concluded that the legacy to Harry Harkness Flagler was contingent and not vested.

B. Petitioners had no substantial ownership of the property until the termination of the trust.

We have shown that Petitioners had no right to receive the property involved in these cases until the termination of the trust in 1923, and the Petitioners had no right to the income from the property during the trust term. We have also shown that Petitioners had no *in rem* interest in the property they received before that time, and, furthermore, the stock to be delivered to the Petitioners at the termination of the trust might have been lost in a speculative railroad and hotel business. Any one of these considerations seems sufficient to show that the Petitioners did not acquire the property involved in these cases at the death of the Testator in 1913. Actually all of these factors were present, and the cumulative effect of all of the limitations on the rights of the Petitioners is stronger than any one

taken separately. When these limitations are given their cumulative effect the conclusion is inescapable that Petitioners had no substantial ownership of the property in question at the Testator's death in 1913. At that time they did have contingent bequests which in themselves may be called property but they did not at that time acquire the property which they sold in 1934 and 1936 and which is involved in these proceedings.

Section 113(a)(5) of the Revenue Acts of 1934 and 1936 as applicable to the instant cases deals with specific property disposed of by the Petitioners in 1934 and 1936 and it is unnatural to assume that when Congress used in that section the terms "acquired" and "time of such acquisition" it intended those terms to be applied to anything but such property. There is not any basis in judicial decisions, departmental interpretation, or legislative history for the assumption that Congress intended to provide that a taxpayer should take as a basis of property disposed of by him the value of similar property at a time when he had only a contingent right[1] to acquire in the future such property.[2]

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[1]In Florida a contingent interest is considered even less substantial than would be true in the vast majority of other American jurisdictions. 1 Simes, *op. cit. supra,* § 113; *cf. Blocker* v. *Blocker,* 103 Fla. 285, *supra.*

[2]Obviously vested and contingent interests are so different that different rules of taxation may be applied in respect thereof. The Supreme Court has upheld the constitutionality of a state statute whereby vested and contingent remainders were taxed differently for inheritance tax purposes. *Salomon* v. *State Tax Commission of New York,* 278 U. S. 484 (1929). There the Court said, page 487: "As the remainders are contingent, it is impossible to know before the contingency happens in whom the remainders will vest * * *." The Court added at page 491: "Moreover, there are differences between vested and contingent remainders which justify classification in imposing inheritance taxes."

CONCLUSION

The decisions of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Statutes

Section 202(a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, provided as follows:

> That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

Section 202(a)(3) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provided in part as follows:

> In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisiton.

Section 204(a)(5) of the Revenue Act of 1924, c. 234, 43 Stat. 253, provided in part as follows:

> If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

Section 204(a)(5) of the Revenue Act of 1926, c. 27, 44 Stat. 9, was the same as Section 204(a)(5) of the Revenue Act of 1924.

Section 113(a)(5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, provided in part as follows:

> **Property Transmitted at Death.**—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.

Section 113(a)(5) of the Revenue Act of 1932, c. 209, 47 Stat. 169, was the same as Section 113(a)(5) of the Revenue Act of 1928.

Section 113(a)(5) of the Revenue Act of 1934, c. 277, 48 Stat. 680, provided in part as follows:

> **Property Transmitted at Death.**—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

Section 113(a)(5) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, was the same as Section 113(a)(5) of the Revenue Act of 1934. The same provision was also included without change as § 113(a)(5) of the Revenue Act of 1938, and § 113(a)(5) of the Internal Revenue Code.

Regulations

Article 113(a)(5)-1 of Regulations 86, under the Revenue Act of 1934, reads in part as follows:

> Art. 113(a)(5)-1. **Basis of property acquired by bequest, devise, or inheritance.**—(a) *Property included.*—Section 113(a)(5) applies—
>
> (1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and
>
> (2) to property passing under an instrument which, under section 113(a)(5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113(a)(5).
>
> (*b*) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113(a)(5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair

market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession of enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other dispositon which section 113(a)(5) recognizes as the measure of gain or loss.

Article 113(a)(5)-1 of Regulations 94, under the Revenue Act of 1936, is the same.

Committee Reports

1928 Act

The Report of the Joint Committee on Internal Revenue Taxation, dated November 15, 1927, contains the following passage (pp. 17-18):

> BASIS FOR GAIN OR LOSS ON SALES BY AN EXECUTOR
>
> Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in *McKinney* v. *United States,* and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.
>
> The rule of the *McKinney* case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.
>
> Section 204(a)(5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

The applicable portion of the Report of the House Committee on Ways and Means (House Report No. 2, 70th Congress, 1st Session, p. 18) is set out at page 22 of the Brief.

The Report of the Senate Committee on Finance (Senate Report No. 960, 70th Congress, 1st Session) contains the following passage (p. 26):

SEC. 113.—BASIS FOR DETERMINING GAIN OR LOSS—EXECUTORS' SALE

The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in Section 113(a)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113(a)(5) and certain related sections, so as to provide that in the case of a specific bequest of personality or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as

a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

The Conference Report on the Revenue Act of 1928 (House Report No. 1882, 70th Congress, 1st Session) contains the following passage (p. 14):

> Section 113(a)(5) is amended (No. 75) so as to provide that in the case of specific bequest of personality or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The

latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; and the House recedes * * *.

1934 Act

The applicable portion of the Report of the Subcommittee of the Committee on Ways and Means, dated December 4, 1933, and entitled "Prevention of Tax Avoidance," is set out at pages 25, 26 and 27 of the Brief.

This was followed by a Statement of the Acting Secretary of the Treasury, the relevant portion of which is set out at page 27 of the Brief.

The Report of the Committee on Ways and Means (House Report No. 704, 73rd Congress, 2nd Session, pp. 27-28) contains the following:

> Under Section 113(a)(5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death, is, in the following cases, the fair market value thereof at the time of the death of the decedent:
>
> (1) Where personal property was acquired by specific bequest;
>
> (2) Where real property was acquired by general or specific devise, or by intestacy;
>
> (3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.
>
> In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.

Included within the phrase "all other cases" is personal property acquired by general or residuary bequest. Thus, where a trustee acquired personal property by general bequest, the basis of the property on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

Section 113(a)(5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisition", which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) Section 113(a)(5) of the bill conforms to the language con-

tained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.

The Report of the Senate Committee on Finance (Senate Report No. 558, 73rd Congress, 2nd Session, pp. 34-35) contains the following:

> Under section 113(a)(5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death, is, in the following cases, the fair market value thereof at the time of the death of the decedent:
>
> (1) Where personal property was acquired by specific bequest;
>
> (2) Where real property was acquired by general or specific devise, or by intestacy;
>
> (3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.
>
> In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.
>
> Included within the phrase "all other cases" is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.
>
> Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell

personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

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Supreme Court of the United States

OCTOBER TERM 1940

No. 734

MARY FLAGLER CARY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 735

HARRY HARKNESS FLAGLER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED,
HARRY HARKNESS FLAGLER, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 737

JEAN LOUISE MATTHEWS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Supreme Court of the United States

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MARY FLAGLER CARY, *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 734
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ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, Executor, *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 736
JEAN LOUISE MATTHEWS, *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 737

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Come now the Petitioners in the above entitled causes, by their Attorneys, and oppose the motion of the Solicitor General that the judgments of the court below in the present cases be affirmed upon the authority of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering* v. *Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473, 474 and 475, this Term, all decided March 31, 1941.

Those cases involved Section 113(a)(5) and Section 101(c)(8) of the Revenue Acts of 1928 and 1932 and the

so-called "first-in-first-out" rule evolved by the Commissioner of Internal Revenue for application to cases where property is sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined. The instant cases, on the other hand, involve only the dissimilar Section 113(a)(5) of the Revenue Acts of 1934 and 1936. The language in that Section to be interpreted in the instant cases is as follows:

> "If the property was acquired by bequest, devise, or inheritance * * * the basis shall be the fair market value of such property at the time of such acquisition."

That language, at the time of the enactment of the Revenue Act of 1934, herein involved, had had a long history of consistent interpretation by the Bureau of Internal Revenue and the courts and had had a long legislative history throwing light on its interpretation.

The language of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 involved in the *Maguire, Gambrill,* and *Campbell* cases was "time of distribution to the taxpayer" rather than "time of such acquisition", which is the language involved in the instant cases. The decisions as to the meaning of the phrase "time of distribution to the taxpayer" cannot be decisive of the instant cases, and we respectfully submit that dicta or decisions as to the meaning of "acquisition" in other Acts and in other contexts should not be taken without argument on behalf of these Petitioners as decisive of the issue involved in the instant cases. Particularly is this true in view of the fact that this Court may have been misled by the following paragraph from page 6 of the Government's Brief in the *Maguire* case:

> "The historical development of the statutory provisions dealing with the basis for property ac-

quired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition. This scheme gives effect for income tax purposes to all changes in value of property following a gift or transmission at death. We think that with the exception of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 there has been no legislative departure from this principle."

That statement is not in accordance with the facts. See *Taft* v. *Bowers,* 278 U. S. 470 (1929), Section 202(a)(2) of the Revenue Act of 1921, Section 204(a)(2) and (3) of the Revenue Acts of 1924 and 1926, and Section 113(a)(2) and (3) of the Revenue Act of 1928.

For example, property might have been purchased by a person for $15. It might have been given by that person subsequent to December 31, 1920, to a donee when the property had a fair market value of $10. If the donee sold the property for $12, the increment of $2 of value following the gift, contrary to the statement just quoted, would not be given effect for income tax purposes. In fact, prior to 1934, the donee would have been entitled to report a loss of $3 in his income tax return.[1]

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[1]See page 27 of Report No. 704 of the House Committee on Ways and Means on the Revenue Bill of 1934 where it is said:

"Under Section 113(a)(2) of the present law, if a taxpayer acquires property by gift he is required to use as his basis the basis the property had in the hands of the donor. This section has been utilized to transfer losses from one person who has little income to another person with a large income. For instance, a taxpayer has property which cost him $100,000, but which is now practically worthless. If he sells the property himself, the loss on

The statement in the Government's Brief appears to have been made as a basis for the argument that notwithstanding the fact that Congress in enacting the Revenue Act of 1928 deliberately rejected a provision to the effect that value at death should be the basis in all cases of property acquired by bequest, devise or inheritance, nevertheless a so-called "value-at-death principle" has run through the various Acts except as modified in 1928. In our Brief heretofore filed with this Court in these proceedings we have attempted to show that that "principle" was first discovered by the Treasury Department, contrary to previous rulings and court decisions, in Regulations 86 promulgated February 11, 1935, subsequent to the end of one of the taxable years involved herein.

For further arguments in opposition to the motion of the Solicitor General that the judgments of the court below be affirmed, we refer to our Brief heretofore filed with this Court, and we respectfully request that this Court hear oral argument in support of our contentions.

Respectfully submitted,

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JOSEPH C. WHITE,
Attorneys for Petitioners,
15 Broad Street,
New York, N. Y.

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the sale will not do him any good, due to the fact that he has no income against which to offset it. He transfers such property by gift to a relative or close friend with a large income, and such relative or close friend makes the sales and reduces his income by a $100,000 loss. To prevent such avoidance, this section of the bill requires the donee to use, for the purpose of determining loss, the donor's basis or the market value of the property at the time of the gift, whichever is lower."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 734

MARY FLAGLER CARY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 735

HARRY HARKNESS FLAGLER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

295279—41

No. 737

JEAN LOUISE MATTHEWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of writs of certiorari in these cases.

The question presented in these cases is whether under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936 the proper basis for measuring the gain or loss from the sale in 1934 and 1936 of certain shares of stock is the fair market value (1) as of the date in May 1923, when the stock was distributed to the taxpayers by trustees of a testamentary trust, or (2), as of the date of the testator's death on May 20, 1913.

The Board of Tax Appeals sustained the Commissioner's contention that the proper basis was the fair market value of the stock on the date of the death of the testator, and its decision was affirmed *per curiam* by the Circuit Court of Appeals for the Second Circuit upon the authority of its earlier decision in *Van Vranken* v. *Helvering*, 115 F. (2d) 709. The petition for writs of certiorari in these cases asserts (Pet. 6–7) that the holding of the Cir-

cuit Court of Appeals is in conflict with *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th). We agree that there is a substantial conflict between these cases. The Government has filed a petition for certiorari in the *Reynolds* case, No. 684, present Term, in which there is alleged a conflict with the *Van Vranken* case.[1]

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1941.

[1] If the question in the present cases should turn, contrary to our contention, upon whether the interests of the taxpayers under the testamentary trust were "vested" or "contingent," we wish to reserve the right to make the contention that their interests were vested rather than contingent.

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305396—41

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, moves that the judgments of the court below in the present cases be affirmed, upon the authority of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering v. Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473, 474, and 475, this Term, all decided March 31, 1941.

The only question involved in these cases is the same as the first question presented in the *Reynolds* case, No. 684, this Term. The reasons for believing that this question is resolved in the Government's favor by the cases above cited are set out in the Government's motion to reverse in the *Reynolds* case, to which the Court is respectfully referred.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

APRIL 1941.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinions of the Board of Tax Appeals (No. 734, R. 75; No. 735, R. 27; No. 736, R. 25; No. 737, R. 25) are unreported. The *per curiam* opinion of the Circuit Court of Appeals (R. 93) [1] is reported in 116 F. (2d) 800.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 22, 1941. (No. 734, R. 94; No. 735, R. 48; No. 736, R. 46; No. 737, R. 45.) The petition for writs of certiorari was filed on January 31, 1941, and granted on March 10, 1941. (No. 734, R. 95; No. 735, R. 49; No. 736, R. 47; No. 737, R. 46.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, is the basis for computing the gain or loss on the sale of securities by a beneficiary of a testamentary trust (1) the value of the stock when delivered to the beneficiary, or (2) the value on the date of death of the testator? [2]

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[1] All record references, unless otherwise indicated, are to the record in the *Cary* case, No. 734.

[2] Annie L. Flagler, now deceased, actually received the shares which she sold in 1936 as a gift from her husband, Harry Harkness Flagler, in 1932. (No. 736, R. 29.) But since she is required to use the basis of the donor (Section 113 (a) (2) of the Revenue Act of 1936, Appendix, *infra*,

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set out in the Appendix, *infra*, pp. 18–21.

STATEMENT

On May 20, 1913, Henry M. Flagler (hereinafter called the testator), a resident of Florida, died, leaving a last will and testament dated February 1, 1902, and seven codicils executed from 1903 to 1912, inclusive. The will and codicils thereto were duly admitted to probate in St. Johns County, Florida, on May 24, 1913. (R. 18.)

Under his will (R. 23) the testator created a trust covering substantially all of his property, including stock of the Standard Oil Company of New Jersey (R. 18). The purpose of the trust was to provide money to continue and carry on the development of the testator's extensive interests in railroads and hotel and land companies in Florida. (R. 23–24.) The trust was to continue for a period of five years after testator's death and for a further period of five years if the hotel or railroad companies required financial aid. (R. 25.)

The will provided (R. 25–26):

> Seventh: At the expiration of said trust, the Trustees shall deliver, assign, and trans-

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p. 18), and he received the predecessor stock from the testamentary trustees, the situation is the same as if she had herself been the recipient of the stock from the trustees and the question is thus the same in all the cases.

> fer by proper instrument or instruments to my son Harry Harkness Flagler, Five Thousand (5,000) shares of the capital stock of the Standard Oil Company of New Jersey, which shares of stock are hereby given to my said son. And in the event that at the expiration of said trust there shall be any child or children of my said son living, then I direct that eight thousand shares of the stock of the said Standard Oil Company shall be delivered, assigned and transferred to such child or children as shall then be living, such children, if there be more than one child, to take such stock in equal proportions, and should there be no child of my said son living at the termination of said trust, then such eight thousand shares of stock shall remain a part of such trust estate and go to my wife with the balance of the residue thereof the same as if no provision had been made herein as to such eight thousand shares of stock. * * *

The residue of the estate was given to the testator's wife. (R. 28.) The trustees were given full powers of management of the trust property. (R. 28–29.)

The codicil executed September 13, 1912 (R. 46) contained the following provision (R. 45):

> Second. It is my will that the legacy and bequest to my son, be void and lapse, if my said son should die before me, and in that event, the legacy and bequest, to him, shall become and be part of my residuary estate.

Prior to the death of the testator, and pursuant to a court decree providing for the disintegration of the Standard Oil Company of New Jersey,[1] there had been issued to and received by the stockholders of that company one ordinary share of the stock of the Anglo-American Oil Company, Ltd., for each share held of the stock of Standard Oil Company of New Jersey. (R. 19.) Thus, the trustees received Anglo-American Oil Company, Ltd., shares instead of Standard Oil Company shares.

The petitioner Harry Harkness Flagler was the only son of the testator and is the son referred to in the will and various codicils. (No. 735, R. 22.) At the date of the expiration of the trust, three children of Harry Harkness Flagler were living, two of whom are the petitioners Mary Flagler Cary and Jean Louise Matthews. (No. 734, R. 19; No. 737, R. 21.) Annie L. Flagler, since deceased, was the wife of Harry Harkness Flagler. (No. 736, R. 22.)

On April 26, 1921, the trustees determined that it was no longer necessary to hold certain shares of the stock of the Anglo-American Oil Company, Ltd., as a part of the corpus of the trust and they delivered them to petitioner Harry Harkness Flagler. (No. 735, R. 23–24.) Subsequent to May 20, 1923, but as of that date, the trustees transferred the remaining Anglo-American Oil shares to

[1] *United States* v. *Standard Oil Co.*, 173 Fed. 177 (C. C. E. D. Mo.), affirmed with modifications, 221 U. S. 1.

Harry Harkness Flagler, Mary Flagler Cary, and Jean Louise Matthews, and the trust terminated. (No. 735, R. 24; No. 734, R. 19; No. 737, R. 22.)

On January 31, 1930, there was a tax-free reorganization of the Anglo-American Oil Company, Ltd., pursuant to which one share of preferred stock of the Standard Oil Export Corporation was exchanged for each 5⅝ shares of the Anglo-American Oil Company, Ltd. (No. 735, R. 24–25; No. 734, R. 20; No. 737, R. 23.)

The present litigation arises out of sales of Standard Oil Export stock made by petitioners in 1934 and 1936. (No. 734, R. 20–21; No. 735, R. 24–25; No. 736, R. 22; No. 737, R. 23.)[4] In filing returns for 1934 and 1936 petitioners took as the basis for measuring gain from the sales in 1934 and 1936 the fair market value of the predecessor stock on the date of transfer of such stock to them by the trustees. The Commissioner, holding that the basis for measuring gain was the fair market value of the predecessor stock on the date of testator's death, May 20, 1913, determined deficiencies in all four cases. (No. 734, R. 11–15; No. 735, R. 12–17; No. 736, R. 11–15; No. 737, R. 12–17).

The Board of Tax Appeals sustained the Commissioner (R. 75) and the court below affirmed, *per curiam,* on the authority of its prior decision

[4] As pointed out above, footnote 2, Annie L. Flagler received the shares she sold as a gift from her husband, Harry Harkness Flagler.

in *Van Vranken* v. *Helvering,* 115 F. (2d) 709 (R. 93) now pending on petition for certiorari, No. 836 this Term.

SUMMARY OF ARGUMENT

The only issue involved in these cases is the basis to be used in measuring the gain from the sales of the Standard Oil Export Corporation stock in 1934 and 1936. The applicable statute provides that the basis of property acquired by bequest, devise or inheritance shall be the fair market value of such property "at the time of such acquisition." The Government contends that the "time of such acquisition" is the date of the testator's death, not the time when the shares were distributed to the beneficiaries by the testamentary trustees, and that the basis is therefore the fair market value of the predecessor stock as of such date of death. We rely upon the argument in the brief filed for the Commissioner in the companion case of *Helvering* v. *Reynolds,* No. 684 this Term, and believe that the issues in these cases were determined in the cases of *Maguire* v. *Commissioner,* No. 346 this Term, *Helvering* v. *Gambrill,* No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473–475 this Term, all decided March 31, 1941.

Petitioners' argument, based upon the legislative history of the phrase "time of such acquisition," is not controlling.

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ARGUMENT

THE BASIS FOR MEASURING GAIN OR LOSS FROM THE SALES OF STOCK OF THE STANDARD OIL EXPORT CORPORATION IN 1934 AND 1936 IS THE FAIR MARKET VALUE OF THE PREDECESSOR STOCK AS OF THE DATE OF THE TESTATOR'S DEATH

The only issue involved in these cases is the basis to be used in measuring the gain from the sales of Standard Oil Export Corporation stock in 1934 and 1936. The parties are agreed that the basis of the shares sold is that of the shares of the Anglo-American Oil Company, Ltd., surrendered on the exchange. See Sections 112 (b) (3) and 113 (a) (6) of the Revenue Acts of 1934 and 1936. Hence the specific issue is whether under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, Appendix, *infra* pp. 18–19, the basis is the fair market value of the Anglo-American shares as of the date of Henry M. Flagler's death on May 20, 1913, or the fair market value of the shares as of the date of their distribution to Harry Harkness Flagler, Mrs. Cary and Mrs. Matthews in 1921 and 1923.

Section 113 (a) (5) provides that the basis for computing gain or loss on the sale of property acquired by bequest, devise or inheritance shall be "the fair market value of such property at the time of such acquisition." The Treasury Regulations provide, Appendix, *infra,* pp. 19–21, and the Government contends, that the "time of * * *

acquisition" by the beneficiary of a testamentary trust is the date of the testator's death, regardless of the nature of the beneficiary's interest. The argument in the brief filed for the Commissioner in the companion case of *Helvering* v. *Reynolds*, No. 684 this Term, is applicable here and we rely upon the reasons there set forth without repetition. As there stated, we believe not only that the legislative history of Section 113 (a) (5) and the whole purpose and structure of the statute support our view, but that the issues here were plainly determined in the cases of *Maguire* v. *Commissioner*, No. 346 this Term, *Helvering* v. *Gambrill*, No. 472 this Term, and *Helvering* v. *Campbell* and related cases, Nos. 473–475 this Term, all decided March 31, 1941.

The principal argument made in petitioners' brief is that, at the time of passage of the Revenue Act of 1934, the words "time of * * * acquisition" had come to have an accepted construction, namely, that "legatees did not acquire property until a substantial interest therein became vested in them", and that Congress must be deemed to have used the words in this sense in enacting the 1934 Act. (Pet. Br. pp. 14–31.) The claim that the phrase possessed the meaning alleged is based upon certain Office Decisions of the Bureau of Internal Revenue and upon certain decisions of the lower Federal courts interpreting the same words as used in the Revenue Acts prior to 1928. Al-

though this contention seems plainly foreclosed by the *Maguire, Gambrill,* and *Campbell* decisions, we will nevertheless consider it briefly.

In the first place, the construction of the phrase in question was by no means clearly settled at the passage of the Revenue Act on May 10, 1934. This is evident from the following facts:

(1) As pointed out in our brief in the *Reynolds* case, Office Decisions have none of the force and effect of Treasury Decisions and do not commit the Department to any interpretation of the law. *Reynolds* Brief, p. 15; *Higgins* v. *Helvering,* No. 253 this Term, decided February 3, 1941; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 468. On the other hand, Treasury Regulations applicable to the Acts prior to 1928 consistently stated that the basis of property acquired by bequest, devise, or inheritance should be the value at date of such acquisition, making no distinction between "vested" and "contingent" interests.[5]

(2) Prior to May 10, 1934, only one Circuit Court of Appeals had ruled squarely upon the question at issue.[6] The other decisions prior to that time either arose under the different provisions of

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[5] Treasury Regulations 33 (1918 Revision), Article 4, Par. 44 (1916 Act); Treasury Regulations 45, Article 1562 (1918 Act); Treasury Regulations 62, Article 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Article 1594.

[6] *Pringle* v. *Commissioner,* 64 F. (2d) 863 (C. C. A. 9th).

the 1928 Act,[7] or, while making a distinction between vested and contingent remainders, found the remainder to be vested and held the date of acquisition to be the date of the testator's death.[8]

(3) The effect of the Supreme Court's decision in *Brewster* v. *Gage*, 280 U. S. 327, and whether the *Pringle* case was consistent with that decision, were by no means clear at the passage of the 1934 Act. This is apparent from the decision of the Circuit Court of Appeals for the Second Circuit in *Warner* v. *Commissioner*, 72 F. (2d) 225, certiorari denied 293 U. S. 620. In that decision, rendered about two months after the passage of the 1934 Act, the court pointed out that the principle of *Brewster* v. *Gage* might be controlling in the case of a remainderman regardless of the nature of his interest (p. 228):

> It perhaps may be doubted if a remainder interest, whether "indefeasibly vested," "vested subject to be divested," or "contingent," is not "acquired" at the date of the testator's death within the meaning of the decision in *Brewster* v. *Gage*, 280 U. S. 327.

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[7] *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d); *Becker* v. *Anchor Realty Co.*, 3 F. Supp. 22 (D. C. E. D. Mo.), aff'd May 10, 1934, 71 F. (2d) 355 (C. C. A. 8th).

[8] *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st); *Huggett* v. *Burnet*, 64 F. (2d) 705 (App. D. C.); *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th).

(4) As a matter of fact, there apparently existed a difference of opinion between the departmental rulings upon which petitioners rely and some of the court decisions, upon which petitioners also rely, as to what the rule actually was. In G. C. M. 10260, XI–1 Cum. Bull. 79, to which petitioners refer as embodying the departmental rule, the General Counsel of the Bureau of Internal Revenue held that the question of whether the taxpayer "acquired" property under Section 113 (a) (5) of the 1928 Act did not depend upon a technical distinction between "vested" and "contingent" interests but upon whether the taxpayer obtained "substantial ownership". This apparently was the position of the court in the *Pringle,* and perhaps the *Lane* and *Becker* cases, *supra.* It is also the rule upon which petitioners rely (Pet. Br. pp. 32–35). However, the Circuit Courts of Appeals for the First and Seventh Circuits, as well as the Court of Appeals for the District of Columbia, considered the question to be simply whether the interest was "vested" or "contingent", the two former courts holding the time of acquisition to be the date of the decedent's death where the interest was vested but subject to be divested. *Chandler, Molter, Hopkins,* and *Huggett* cases, *supra.* That this difference of opinion was a real one is evident from the decision of the Circuit Court of Appeals for the Second Circuit in the *Warner* case, *supra,*

rendered shortly after the passage of the 1934 Act. There the court expressly repudiated the departmental rule as set forth in G. C. M. 10260, saying (p. 227):

> "In a memorandum of the Treasury Department (G. C. M. 10260, XI–1, Cum. Bul. 79) construing the provisions relating to realizations of gain or loss (as changed in the Revenue Act of 1928), it was said that 'the distinction between interests which are technically contingent and interests which are technically vested, subject to being divested should in general be ignored. * * * The question is whether the taxpayer has acquired sufficiently substantial ownership to satisfy the spirit and purpose of section 113 (a) (5) [26 USCA § 2113 (a) (5)], and in general, an interest which is vested, subject to being divested, does not give a taxpayer that sort of ownership.' The same idea was apparently in the mind of the court in Pringle v. Commissioner (C. C. A.) 64 F. (2d) 863, 864, when it remarked that 'a person cannot be said to have "acquired" property within the meaning of the Revenue Act [1921], § 202 (a) (3), * * * before he has some substantial ownership therein.' But it would be harder to use substantial ownership as a test than to distinguish between vested and contingent remainders. In spite of the casuistry involved in differentiating between vested and contingent remainders, courts would have criteria available, however technical and unsatisfac-

> tory, which they are accustomed to use. But such a vague test as substantiality would leave us wholly without a standard. The question, we think, is whether, under the law of Ohio, where the testator was domiciled, the remainder interest vested in the taxpayer at the time of the testator's death subject only to be divested if the taxpayer died before the expiration of the trust. If it did, the remainder was vested, though not indefeasibly and the securities were accordingly 'acquired' on October 4, 1921."

In view of this divergence it can scarcely be assumed that Congress, without making any mention of the fact, incorporated either one rule or the other in the 1934 Act.

In the second place, regardless of the status of the rule in departmental rulings and in the lower Federal courts, there is no evidence whatever that Congress intended to adopt any such construction in the 1934 Act; on the contrary, such evidence as exists points to the assumption by Congress that the principles of *Brewster* v. *Gage* would apply in all cases:

No distinction between "vested" and "contingent" interests had ever been made in the Acts prior to 1928. When the House proposed to clarify the meaning of "acquisition" in 1928, it expressly fixed the crucial date as the date of the decedent's death. (H. R. 1, 70th Cong., 1st Sess.) The changes made by the Senate Committee were

intended to take care of relatively minor situations where the date of death would not be applicable, not to change the basic value-at-death rule. (See *Reynolds* brief, pp. 10–11.) When, in 1934, the reversion to the former phrase occurred, both Committee reports explained it simply as a result of the clarification resulting from *Brewster* v. *Gage*, which, according to the Committees, "defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal." (H. Rept. No. 704, 73rd Cong., 2d Sess., p. 28; S. Rept. No. 558, 73rd Cong., 2d Sess., p. 34.)[9] At no time in the Committee reports was there any reference to departmental rulings, to lower Federal court decisions, or to any case other than *Brewster* v. *Gage*. At no time, either in Committee reports or in the legislation, was any word inserted to indicate an intent to distinguish between "vested" and "contingent" remainders.[10]

Finally, as against any remote possibility that Congress intended to incorporate in the 1934 Act the departmental-lower court construction, or

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[9] While it is true, as petitioners contend, that one of the reasons for the reversion to the previous language in the 1934 Act was to eliminate the distinction between the treatment of real and personal property, nevertheless the Committee's statement is very broad and contains no hint of an exception for contingent remainders.

[10] For further consideration of the intent of Congress in the 1934 Act, see Judge Arant's discussion in *Augustus* v. *Commissioner*, 118 F. (2d) 38 (C. C. A. 6th).

either version thereof, there must be weighed the considerations already set forth in the *Reynolds* brief, including the fact that petitioners' construction is contrary to the whole purpose and structure of the Act; that petitioners' construction makes the application of the statute depend upon the complexities and vagaries of local law; that, for purposes of fixing a basis for tax purposes upon property which the taxpayer has realized and sold, there exists no reason for making a distinction between interests that are "vested," "vested subject to be divested," or "contingent"; and that, following the promulgation of the Treasury Regulations interpreting the 1934 Act in the manner here contended for, Congress reenacted the provision without change, the provision remaining unchanged at this time.

Much of petitioners' brief is taken up with the argument that petitioners did not possess "substantial ownership" of the property in question at the testator's death, and that the interest acquired by petitioners was contingent under Florida law. (Pet. Br. pp. 32–52.) In view of the *Maguire*, *Gambrill*, and *Campbell* decisions, we have not briefed this point; nor did the court below pass upon it. Should this Court rule, contrary to our contention, that the nature of the taxpayer's interest is material, we assume that it will remand to the Circuit Court of Appeals for ruling on the point under the appropriate state law.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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APRIL, 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that for the purpose of determining loss the basis shall be the basis so determined or the fair market value of the property at the time of the gift, whichever is lower. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner.

* * * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the date of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power by bequest or devise.

* * * * *

(U. S. C., Title 26, Sec. 113.)

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sections 113 (a) and (5) are identical with the above-quoted provisions of the Revenue Act of 1934.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (5)-1. *Basis of property acquired by bequest, devise, or inheritance—(a) Property included.*—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law govern-

ing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands

of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect to such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which section 113 (a) (5) recognizes as the measure of gain or loss.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 113 (a) (5)–1 of these Regulations contains provisions identical with those of Article 113 (a) (5)–1 of Regulations 86, above quoted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 734, 735, 736, 737.—October Term, 1940.

Mary Flagler Cary, Petitioner,
734 *vs.*
Commissioner of Internal Revenue

Harry Harkness Flagler, Petitioner,
735 *vs.*
Commissioner of Internal Revenue

Estate of Annie L. Flagler, Deceased, Harry Harkness Flagler, Executor, Petitioner,
736 *vs.*
Commissioner of Internal Revenue

Jean Louise Matthews, Petitioner,
737 *vs.*
Commissioner of Internal Revenue

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

Henry M. Flagler died on May 20, 1913. Petitioners are legatees under a testamentary trust created under his will. The trust continued for a period of ten years from his death and terminated on May 20, 1923. As of that time the trustees delivered to petitioners[1] certain securities which were sold by them in 1934 and 1936. The question presented is whether the basis for computing gain or loss on such sales under § 113(a)(5) of the Revenue

[1] Some securities had previously been delivered to Harry Harkness Flagler, petitioner in No. 735, on April 26, 1921. Annie L. Flagler, whose estate is the petitioner in No. 736, received the securities here involved as a gift from her husband, Harry Harkness Flagler. The situation therefore is the same as to both these parties, since it is stipulated that he had received the securities as indicated above.

Acts of 1934 (48 Stat. 680) and 1936[2] (49 Stat. 1648) is the value of the securities when delivered to the legatees or their value on the date of death of the decedent. Petitioners make substantially the same argument for application of the former criterion as did respondent in *Helvering* v. *Reynolds,* No. 684, decided this day. And they contend that under Florida law they had at the date of death only contingent interests. But assuming they are correct in the latter contention, it is of no avail. For the reasons stated in *Helvering* v. *Reynolds, supra,* the proper basis was the value of the securities at the death of the decedent. Accordingly, the judgments of the court below (116 F. (2d) 800) must be

Affirmed.

The CHIEF Justice and Mr. Justice ROBERTS dissent for the reasons stated in their dissent in *Helvering* v. *Reynolds,* No. 684, decided this day.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[2] Sec. 113(a)(5) of the 1936 Act is the same as § 113(a)(5) of the 1934 Act. Art. 113(a)(5)-1 of Treasury Regulations 94, promulgated under the 1936 Act, contains provisions identical with those of Art. 113(a)(5)-1 of Regulations 86 under the 1934 Act. The relevant portions of that section and regulation under the 1934 Act are set forth in Helvering *v.* Reynolds, *supra.*